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THE INCIDENCE OF JURY TRIAL DURING THE PAST CENTURY

At page 144 of the last number of THE MODERN LAW REVIEW the figure for jury trials in 1935 is quoted as ·6 per thousand judgments. This should have read ·06, thus justifying the author's comment that in 1935 jury trials in the county courts had practically ceased to exist.

THEORIES OF LAW AND JUSTICE OF FASCIST ITALY

INTRODUCTORY

IDEOLOGICAL analysis is a hazardous activity at the quietest of times on the most innocuous of topics. At least thrice as great as this minimum is the hazard which must be felt by the writer of the following pages. For these are not the quietest of times—rather are they times made terrible by the clash of idea upon idea, and of sword upon sword as the ruthless and truthless arbiter between them. Nor is Fascism the most innocuous of topics that might be chosen by one who believed that ideas

might still repay analysis—rather is it among the most aggressive, disruptive and disquieting forces at work in the modern world.

No *caveat* can give immunity from these incidental hazards. Yet there is one grave hazard which is not properly incidental to the task the writer has undertaken. This article is concerned only with fascist *theories* of law and justice; with what those who guide the destinies of fascist Italy profess to think about what they do. It is not concerned with the divergence between what they *do* and what they *profess*. It must not be assumed therefore, that because theories are here stated and analysed at their face value the writer is innocent of the extent to which performance, and indeed, even sincere endeavour may fall short of profession.

This warning is all the more necessary since the prevailing approach to Fascism in democratic literature is precisely the one which the present writer seeks to avoid. The prevailing approach proceeds along the following path. Fascist theories may be more advanced than those of the most progressive democracies, but fascist practice falls far behind the practice even of the most backward democracies. The corporative state in theory, so it is said, is one thing, the fascist syndicalist and corporative actualities are quite another. Now this prevailing approach takes for granted that fascist theories of social organisation, and of law and justice are theories highly advanced when compared with those of the great democracies. It is this very assumption which the present article seeks to probe. Do the component theories of Fascism, even ignoring the deficiencies of practice, represent any novel or progressive contribution to our theories of the social order? It will surely be of the utmost significance, if, as the writer has come to believe, the high sounding ideas of the corporative state resolve themselves on analysis into ideas which, for the most part, have long been commonplace in modern democracies, and which for the rest, are remarkable only because of their extremely reactionary character.

I. The Component Ideas of Fascism

An inquiry into fascist theories, whether in the juristic, political or economic fields, is a very difficult one. The constantly repeated claim of fascist political leaders is that they have not proceeded on any theories at all, that theirs is a philosophy of action and not of words, that they meet each situation as it arises, and that theories with them are produced by solutions, not solutions by theories. After their policy on the particular

matter is framed, they may find that it is capable of explanation in terms of some pre-existing theory. But that is mere coincidence, or to put it another way, the pre-existing theory was but a prophecy of Fascism. Mussolini is said to keep a list of the prophets of Fascism, which increases daily and has now attained a considerable length. It ranges at least from Dante to Pareto. Moreover, this denial of the influence of theories on events is characteristic of the theorists as well as the practical men of Fascism. It is the stand taken by such outstanding apologists of Italian Fascism as Giovanni Gentile and Alfredo Rocco. They claim no more for their theories than that they are *ex post facto* explanations of the "fascist philosophy of action."

This on the one hand. On the other there are few statements of policy by either politician or theorist which do not lay down broad propositions about the end and the nature of law and of the state. But these propositions are laid down as newly discovered truths usually without reference to pre-existing thinking along the same lines, or at most with an acknowledgment that propositions a little like them have been thought of before. This acknowledgment is rarely an acknowledgment of indebtedness; it is rather a complimentary bow to a "prophet" of Fascism. Such complimentary bows might be useful in delimiting the scope of the present inquiry, were it not, on the one hand, that they are made so indiscriminately, and were it not on the other, that in the desire to show that the fascist theory is "different" the heritage both of problems and solutions that has been taken over bodily into fascist policy and thought is constantly overlooked.

"Il fascismo" writes Mussolini, "ha oramai nel mondo l'universitalità di tutte le dottrine, che, realizzandosi, rappresentano un momento nella storia della spirito umano."[1]

In face of such a situation the most that the student can do is to make his own choice of the theories urged by Fascists that are significant for understanding what Rocco calls "the transformation of the state"[2] under Fascism. This paper will be constructed around four such items.

The first is the set of ideas represented by the notion of the corporative state, that is of a state organised on the basis of economic groups each including all factors involved in a particular branch of production. Internally viewed these groups are

[1] The need for the introductory caveat will be brought home to the reader who attempts to analyse the article on the doctrines of Fascism by Benito Mussolini in 14 *Enciclopedia Italiana*, 847–851 at the end of which the above sentence appears.

[2] Afredo Rocco, *La Trasformazione dello Stato Liberale allo Stato Fascista*, 1927.

co-operative units, including not only labour but capital and administration. Externally viewed they are units of co-operation within the entire economic structure of the state. From the former, the internal viewpoint, the groups represent the absolute antithesis of the Marxian notion of the class struggle. From the latter, the external viewpoint, they indicate a close connection between political organisation and economic organisation which is thoroughly Marxian. These units or *corporations* are organs of the state, and represent the power of the state in the economic sphere. They are given wide functions of controlling the activities of both employers and employees. Employers' organisations, as well as employees' syndicates, are in important respects subject to their supervision. Theoretically, though this has not yet been realised in fascist Italy,[3] representation of the people in government is to be based on this hierarchy of corporations. Conversely, and this is much nearer achievement in Italy, the state by its control over the corporations as state organs, is to control rigidly all economic activities within it. The corporative theory of the state in short is one of social control of economic organisation.

Side by side with the economic aspect of fascist theories of the end of law, is the nationalist aspect. The exaltation of Italianism covers such phenomena as the assertion of the organic unity of the Italian people, past, present and future, of its reality transcending the mere aggregate of human beings alive at any particular moment, and consequently of the superiority of its claims to those of any particular human beings, and finally the insistence on the unique and indispensable role which the Italian people have played in the past and are destined to play in the future of the world. Law is essentially a means of maintaining, preserving and advancing the greatness of the Italian people. This is the second item in fascist ideology which calls for discussion.

The word "fascist," however, obviously connotes more than control of economic activity and exaltation of the nation. It connotes in addition certain ideas as to the machinery by which these ends are to be achieved. These ideas may be divided broadly into two categories, which are respectively the third and fourth items chosen for discussion in this article.

The third is the supreme emphasis upon "the strong state" in fascist Italy. Beginning no doubt as a demand for efficiency

[3] Mussolini in a speech of March 23, 1936, announced that the existing Chamber of Deputies was to be suppressed, and a national Assembly of Corporations representing the nation's productive forces substituted.

in social control, the idea of the strong state has gone far beyond this. The "strong state" has developed into the "stato etico," the state as an end in itself. As Bianchi has said:

> "The State for Mussolini is not only a political reality, it is an ideal and moral reality. The living person of the State is not an abstract concept, a juridical formula, but a sentiment and a will, the sentiment and will of the nation.
>
> "The position that Rousseau had taken is radically reversed; the State is no longer an instrument for the conservation of individuals and to assist them to achieve their ends; on the contrary it is the individuals who become a means, an instrument of the life of the state."[4]

The fourth is the notion of a government of men and not of laws, subordination of the entire hierarchy of government to the person who in fact wields the power of the strong state, and the freedom of that person from responsibility to the people or its elected representatives. In short the faith in personal dictatorship.

No one of these four elements alone distinguishes Fascism from other forms of government. The assertion of control by the state over economic activities is common to all modern industrialised countries. Exaltation of the nation has characterised political democracies for more than a century; it has usually gone hand in hand with the rise of popular government. The idea of the "strong state" is found throughout history, usually connected with personal dictatorship, in the form of royal or imperial domination. It is obvious, nevertheless, that there is a tremendous difference between a Mussolini on the one hand, and a Justinian, a Henry VIII, a Louis XIV, or a Maria Theresa on the other, and this difference lies in the social and economic ideals which are professed as an integral part of Fascism.

It is the combination of these elements in one regime that is the characteristic feature of Fascism. Fascist theories of law are peculiar solely because the subjugation of economic organisation to the state, as the outward manifestation of the nation, is achieved by the overthrow of popular government and the establishment of a personal dictatorship. It follows from this that the search for the ideological forebears of the four elements under consideration is of necessity very wide, but it is none the less interesting for that. Each will be taken up in the order set out above.

[4] Michele Bianchi, *La Représentation Politique dans l'Etat Fasciste* in *Centre International d'Etudes sur le Fascisme, Etudes*, Vol. III, 1930, pp. 44 *et seq.*

II. The Corporative Theory of the State; Links with the "Social Solidarity" of Durkheim and Duguit and the Syndicalism of Sorel

Whether or not, as Fascists assert, the democratic system of government in post-war Italy, prior to Fascism, had proved incapable of adjusting itself to new economic conditions, it certainly cannot be doubted that the conflict between labour and capital[5] was so great as to jeopardize economic production. The state on the one hand seemed unable to control this conflict, and on the other hand, neither of the competing economic forces was able to use the machinery of political democracy so as to resolve it in a decisive, albeit one-sided, fashion. The fascist revolution cut the Gordian knot by discarding the democratic form of government and substituting a personal dictatorship.

The dictatorship proceeded to formulate ambitious plans for the adjustment of the legal structure of the state to the requirements of economic efficiency under modern industrial conditions. These plans purported to encourage and assist workers' and employers' organisations under the state. In its Labour Charter of 27th April, 1927, the programme was given definite form. After declaring economic activity to be a central concern of the state,[6] the fascist government declared all production to be a unit with objects of "the well-being of the producers and the development of national strength."[7] It purported to guarantee the right of association under state supervision of workers and employers,[8] and as a corollary to give central importance to collective labour contracts,[9] and to compulsory judicial settlement of labour disputes.[10] The unity of all the factors of production was to be given expression in the corporations vested with powers as state organs, and comprising representatives of employers and employees in a number of large groups of economic functions, such as transportation, commerce, agriculture, etc.

Side by side with the assertion of state control over economic organisation and the prohibition of strikes, there appeared in the Charter a number of guarantees for both employers and employees. To the latter, provision for weekly rest days, annual vacations with pay, additional pay for overtime, compensation

[5] See Haider, *Capital and Labor under Fascism*, 1930, Chaps. II and III.

[6] Art. 1, *Gazzetta Ufficiale*, April 30, 1927. For English translation of text for the most part used here see Schneider, *The Making of the Fascist State*, Appendix 23; Haider, *op. cit.*, 87–91.

[7] Art. 2.

[8] Articles 3 and 6.

[9] See Franco Guidotti, *Il Contratto Collectivo di lavoro nel diritto corporativo*, 1936. See also law of April 3, 1936, *Leggi e Decreti*, 1926, Vol. II, 1324–1328.

[10] Articles, 4, 5, 11.

for wrongful dismissal, state control of unemployment offices. Further:

> "The fascist state has the following aims: first, the perfection of accident insurance; second, the improvement and extension of maternity insurance; third, insurance against occupational illness and tuberculosis as an introduction to a system of general health insurance; fourth, the improvement of insurance against involuntary unemployment, and, fifth, the adoption of special forms of endowment insurance for young workers."[11]

To the employers the guarantees in the charter are mainly in the clause that "the consequences of crises in production and in monetary phenomena must be divided equally among all factors of production,"[12] combined with the prohibition of strikes and compulsory adjudication of industrial disputes.

It might be possible to derive the notion of the corporative state directly from the fact that a strong state must be economically strong and unified.[13] It is more significant, however, to observe that the reputed if not the acknowledged fathers of this notion are, on the one hand, the syndicalist theories of Sorel, and on the other, the sociological theories of Durkheim in the juristic form which they were given by Duguit.

There can be little doubt that a major part of the driving force behind the economic programme of Fascism proceeded from the influence of syndicalism, always strong in Italy. Syndicalist economics, created by Blanqui and Lasalle and given systematic expression by Sorel in France, is based on the idea of the concentration of both political and economic power in the hands of the trade unions.[14] There are, of course, different sets of ideas which pass under the name of syndicalism. But the kernel of all of them is the conception that the ideal organisation of society under modern conditions is around the associations of men bound

[11] Art. 27.

[12] Art. 13.

[13] In his speech before twenty corporations of the fascist state on March 23, 1936, when he announced the prospective suppression of the Chamber of Deputies, Mussolini based the necessity of immediate execution of plans for the corporative state and nationalisation of industry squarely on the exigencies of war probabilities.

[14] In this respect it differs essentially from the state socialism of a Proudhon or of a Marx which regards organised society as a whole, and not the units of production, as the immediate object of its solicitude. See Blanqui, *Critique Sociale*, 1885; Sorel, *Introduction a l'économie moderne*, 1903, and *La Décomposition du Marxisme*, 1908. On Blanqui and Sorel see Lorwin, *Syndicalism in France*, 1914. On Lassalle, see G. Brandes, *Ferdinand Lassalle*, 1911, and S. Baron, *Die Politische Theorie Ferdinand Lassalles*, Supp. No. 2, 1923, to *Archiv für die Geschichte des Sozialismus und der Arbeiterwegung*.

together by economic ties, that trade unions are the living cells of a healthy society, and that political institutions must be modified so as to allow them to play their proper role in the body politic. The influence of Sorelian thinking along these lines was very considerable in the pre-fascist labour organisations of Italy.[15] It is important to remember that Mussolini himself was once a socialist and prominent in the labour movement which was a hotbed of syndicalism.

It was not dislike of the syndicalist idea which caused Mussolini's defection. It was rather the inability of the political authority to control manifestations of it injurious to the whole economic order. In any case, whether because of his old sympathies or from necessity, Mussolini did not set out, at any rate avowedly, to destroy the syndicates. On the contrary he set about the creation of highly organised fascist syndicates to replace those of the earlier regime.[16] These he invested with privileges of state recognition; for instance, he limited the right of making enforceable collective labour contracts to fascist syndicates alone. Thus the third section of the Labour Charter provides:

> "Professional or syndical organisation is free, but only those syndicates regularly recognised and subjected to the control of the state have the right to represent legally the whole class of employers or employees for which they are established; to pursue their interests in their relations with the state and with other professional associations; to draw up collective labour contracts obligatory on all those who belong to that class; to impose their interest with respect to them."

Fascism, however, has professed to go beyond the mere subjugation of organised labour to the state. It has theoretically at any rate asserted the power of the state over the whole process of production, and admitted conversely the direct role of the factors of production in the political structure. It has extended the syndicalist notion to associations of all the factors in a particular branch of economic activity. These extended associations are known as the corporations, the corporative state being one in which such economic groupings are recognised as a part of state machinery.

> "The corporations constitute the unitary organisation of the forces of production and integrally represent its interests. In virtue of this integral representation, the interests of

[15] Haider, *op. cit.*, Ch. IV.
[16] Haider, *op. cit.*, Ch. V.

production being national interests, the corporations are recognised by law as organs of the state."[17]

This really represents a synthesis of syndicalist ideology with Duguit's criterion of social solidarity. Duguit himself had suggested such a synthesis as long ago as 1910.[18] It is not the state which is to be remodelled to give free play to associations, it is associations that are remodelled in order to make production more efficient. For this central idea Duguit was deeply indebted to the sociologist Durkheim. It is important, therefore, to glance at the theories of Durkheim and Duguit as to the end of law.

The progress of human society, wrote Durkheim in his *De la Division du Travail Social*,[19] presents a shift from mechanical to organic solidarity, from a solidarity based on homogeneity of needs and functions to a solidarity based on a highly specialised heterogeneity of functions. A modern industrial society has as its very foundation a complex economic organisation. The *sine qua non* of the efficient conduct of that organisation is the unbroken carrying on of all the functions involved, by the human beings to whom they are respectively assigned. What the individual has is a function to perform in this economic enterprise; that is his primary attribute as a member of society, and all the others follow from it. Law becomes an instrument for securing and regulating the operation of a complicated but close fitting system of specialised functions.

Duguit developed these basic ideas with all the earnestness of his temperament, and all the equipment of his training and study as a professor of constitutional law. They are the burden of his song from his first work to his last.[20] On their basis he demolished to his own satisfaction the entire system of private law, substituting for individual rights the protection of social functions. As an iconoclast he proclaimed that all the accepted notions of public and private law based upon metaphysical and natural law postulates were outmoded and unreal. Such notions as "a right," "Sovereign," and "subject," "public law," "private law" he urged have no relationship to the facts of social life and must be discarded. Following what he proclaimed to be a positivistic

[17] Labour Charter, Art. 6.

[18] See *Le Droit Social le et Droit Individuel et les Transformation de L'Etat*, 1910, 105–147. It is obvious that the results of such a synthesis of ideas are in many respects indistinguishable from orthodox state socialism. The domination by the state of the economic units, instead of *vice versa*, removes the vital distinction between syndicalism and state socialism mentioned above, Note 14.

[19] 1893.

[20] Cf. his *L'Etat, Le Droit Objectif et la Loi Positive*, 1901, Ch. 1, with his *Leçons de Droit Public*, 1926, 73–94.

method, he found as the basic fact of social life, social solidarity through similarity of needs and diversity of functions. The role of law is part of this observed fact of social solidarity. Law is valid not by virtue of any sovereign command or of any abstract authority of natural law or justice, but by virtue of the fact that acts done in violation of it cause social disorder and a spontaneous, almost a reflex, movement towards readjustment. The place of the individual in society is determined by the same fact. His only attributes are in terms of function not in terms of rights. So long as the individual performs a function which promotes social solidarity the law will protect him; if he fails in or abuses this function it will withdraw its protection.

From this there followed in Duguit's thought a number of striking results. In the first place, the distinction between public law and private law vanished.[21] What is commonly called public law consists merely of the rules regulating the performance of their specialised function by those individuals who at any given time exercise the powers of government. As with all other individuals the law protects them when they use their powers to further social solidarity, and withdraws its protection when they fail to do so. Duguit applied this to the legislature as well as to other branches of government, and this caused difficulties which he never succeeded in overcoming. Who was to say ultimately whether legislative action tended to further social solidarity? At various times Duguit suggested a supreme tribunal consisting of lawyers and laymen to pass upon the legality of "legislation." He never solved the problem of control, however, for in the terms he uses, it is insoluble.[22]

Duguit showed the consequences of this change over the whole field of law in his books on the transformation of public and private law.[23] They are important not only for their content, but because it is almost certain they they were the model for Rocco's book on the "Transformation of the State from the Liberal State to the Fascist State." Duguit attempted to show by a survey of French legislation and adjudication since the Code Napoleon how the most vital conceptions of law had been transformed. "Liberty," for instance, no longer means the power to do anything that does not injure another. It now means "the consequence of the obligation which is imposed on every man to develop his individuality as completely as possible in order to co-operate as ably

[21] Duguit, *Les Transformations du Droit Public*, 1913, 279–280.
[22] *Traité de Droit Constitutionel*, 1st ed., Vol. I, *pp.* 153 *et seq.*; *Le Droit Social et le Droit Individuel et les Transformations de l'Etat*, p. 58.
[23] *Supra*, Note 18; and *Les Transformations Générales du Droit Privé* (1912).

as possible in the attainment of social solidarity."[24] On all sides men are restrained and regulated on a basis other than that their conduct is injurious to other individuals. The transformation of legal transactions from being the concern only of the parties thereto to being the concern of society as a whole is, he says, equally striking. "From the moment you admit that a legal situation is valid and protected only when it corresponds with a social purpose, it can only arise from an act which itself has a social character." Again the conception of tort is undergoing change by the introduction of liability without fault where the furtherance of social solidarity requires such liability, and the conception of property by limiting the absolute right *uti, abutendi, fruendi* by reference to the requirements of social solidarity. Moreover, new fields of the law are arising to meet the needs of social solidarity, for instance, that of the relations of public utilities with the public, and of labour relations based on collective contracts, which cannot be brought within any of the old conceptions.

Stripped of its exaggerations, Duguit's message was that in a complex economically organised society the supreme test of well-being is efficiency for economic production. For two reasons that message might have caught the ear of fascist statesmen and been adapted by them to Italian needs. In the first place the building of a strong state in modern Europe obviously required as a basis the highest possible efficiency in the economic sphere. In the second place, this requirement was intensified by the disorderly condition of the relations of capital and labour in pre-fascist and early fascist Italy. The flavour of Duguit's writings is unmistakably present in the second article of the much discussed Labour Charter.[25]

> "Labour in all its forms, intellectual, technical, and manual is a social duty. As such and only as such it is safeguarded by the state. The complex process of production is unitary from the national point of view; its aims are unitary and may be summed up in the welfare of the producers and in the growth of national power."

The recent declaration by the Italian government of its intention to nationalise basic industries is but an application of the ideas underlying the corporative state. An efficient functioning of the economic structure may require the state to go beyond mere control and regulation of economic enterprise. The combined

[24] *Les Transformations Générales du Droit Privé*, p. 37.
[25] Cf. the Portuguese Decree of Sept. 24, 1931, establishing a supreme economic council, *Collecção de Legislação Portuguesa*, 1931, 937–47, 945.

ideology of syndicalism and of Durkheim and Duguit makes the transition from state control of function, to state exercise of function, an easy and logical one.[26]

III. The Exaltation of "the Nation"; Links with Fichte, Mazzini and the Hegelian Interpretations of History

Two major lines of reaction to the upheaval of the French revolutionary epoch have been powerful from that day to this. One is the insistence upon continuity in human development, as opposed to exaggerated attempts to create a new world out of whole cloth. The other is the growth of nationalism in opposition to the universal ambitions of Napoleonic Imperialism.

The *Reden an die Deutsche Nation* (1808) of Johann Gottlieb Fichte is the *locus classicus* of nationalist reaction,[27] and whether the reputation of this work is deserved or not, it has been one of the mainsprings of nationalist thinking ever since. The idea of continuity is almost identical in its modern beginnings with that of nationalism. For instance, Savigny's doctrine of the intimate relationship between the *Geist* of a nation and its law was, from another angle, but an insistence on the continuity of human institutions.[28] Burke had made Savigny's proposition many years

[26] It is necessary at this point to reiterate that the above analysis is an analysis of ideas and not of facts. It is not the purpose of this paper to examine the relationship between fascist theory and fascist practice. On that question there should be consulted such works as Rosenstock-Franck, *L'Economie Corporative en Doctrine et en Fait*, Paris, 1933, Finer, *Mussolini's Italy*, 1935, Salvemini, *The Fascist Dictatorship*, in Schmalhausen, *Recovery through Revolution*, 1933, Haider, *op. cit.*, Chaps. XI and XII, and above all Salvemini, *Under the Axe of Fascism*, 1936. More particularly critics of Fascism have laid an indictment containing the following counts against the execution of the fascist economic programme—

(1) That the chaotic condition of pre-fascist economic life is much exaggerated by fascist writers;

(2) that the corporative structure of the state has been up to the present unrealised: even in so far as the corporations have existed effectively they have been at the most advisory bodies, under the political control of the fascist party and its leader. Officials of the corporations have in practice been political appointees rather than representative of the interested economic groups;

(3) that the encouragement of trade union organisation takes the form in practice of compelling all workers to join the fascist syndicates, run by politically appointed fascist officials;

(4) that the prohibition of strikes and the enforcement of collective labour contracts only when made by the politically dominated syndicates in effect destroys the only means of workers to further their interests;

(5) that the programme of amelioration of the condition of labour set out in the Labour Charter existed prior to Fascism, and has made no substantial progress under Fascism;

(6) that even if Italian Fascism has set economic efficiency as its supreme aim, it has failed in that aim.

It is obviously beyond the scope of the present inquiry to do more than indicate awareness of the existence of such criticisms.

[27] The best study in English of Fichte's nationalism is Engelbrecht, *Johann Gottlieb Fichte*, 1933.

[28] Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechstwissenschaft*, 1814, Chaps. 1 and 2; English transl. by Hayward.

before Savigny when he asserted, in an anti-revolutionary address, that a nation holds its law as well as its entire civilisation not as absolute beneficial owner, but on a trust imposed by those who have gone before, for those who come after.[29] With both Burke and Savigny continuity results from the identity of the nation.

But the two ideas soon diverge. Self-determination of a nation, the freedom to realise its highest nature required in many cases a break with the past. In the form of political revolutions this break is obvious; the nation is but throwing off alien oppression. The divergence, however, takes more subtle and more interesting forms. Thus the German nationalists used Savigny's doctrine of the *Volksgeist* to show that alien Roman influences must be purged from the body of German law, whereas he had used them to show the necessity of completely assimilating and mastering them. The conception of a nation as a unique moral and spiritual entity clearly leads to the proposition that unity of nature, not continuity in time, is the supreme desideratum.

The rise of the Hegelian philosophy of history[30] provided a technique whereby the sanction of inexorable development could be put behind any historical fact, or any human aspirations. By its means it was possible to show that anything was the inevitable unfolding of anything else. The charge is notorious that history according to Hegel and many of his followers had reached its culmination in the German state of his day. The idea of liberty in its full development was manifested in the orderly life of the German people under the control of a highly evolved central power. The Scots metaphysical jurist, Miller, saw in English history the unfolding of the idea of individual liberty, the gradual abdication by the state of its control over individual action culminating in the unshackling legislation of his own day.[31] Maine saw a movement in the history of human relations from status to contract.[32] Left wing Hegelians saw in history one long but inevitable struggle for the emancipation of the wage slave or the satisfaction of economic wants. An intelligent writer on American constitutional law saw in the constitution a stage in the growth of the natural rights of men from the acorn stage to the oak stage.[33] The theory of evolution after the turn of the century added to the fascination of intellectual speculation the

[29] Edmund Burke, *Reflections on the Revolution in France*, 1790.

[30] See Hegel, *The Philosophy of History* (delivered 1830–1831), transl. by Sibree, Introduction passim. esp. III, *Philosophical History*, pp. 9–27, 63–65.

[31] Miller, *Philosophy of Law*, 1884, pp. 63, 68–69, 71–72.

[32] Maine, *Ancient Law*, 3rd Am. ed., 165.

[33] Campbell, *Science of Law according to the American Theory of Government*, 1887, 16–20, esp. 17.

support of the natural science of life. Nature herself proceeds by an Hegelian dialectic. How then can man doubt its validity?

The idea of the nation adorned and exalted into a religious idol by the Hegelian dialectic is the ideological source of Italian nationalism. Its outstanding prophet is undoubtedly Giuseppe Mazzini,[34] though, of course, with Mazzini there was as yet no trace of the Hegelian taint. Mazzini played a role in the Italian struggle against the Austrian Empire and the Papal States similar to that played by Fichte in the German struggle against France. He formulated and put into inspiring words the theory that the Italian nation was a single moral and spiritual unity, of which Rome was the centre. He combined his call for the emancipation of all nations with a faith in the democratic form of a government, as the only means whereby each might develop the richness of its individual characteristics.[34a]

The nationalist aspect of Mazzini's thinking was carried on and elaborated by writers who, putting it into Hegelian form, demonstrated the inevitability and continuity of the greatness of the Italian nation. As early as 1843 this had already been attempted in a crude sort of way by Vincenzo Gioberti,[35] who in his *Del Primato Morale e Civile degli Italiani*,[36] proclaimed the unity and continuity of the Italian destiny, from the greatness of the Roman Empire, through the greatness of the Catholic Church, to the potential greatness of the reviving Italian unity, and to its clear mission of re-establishing European civilisation by acting as a "moral centre of action . . . where the source of motion may reside and whence movement may be spread to all its parts as from the centre to the circumference."[37] Its greatness and primacy was thus made into the idea struggling to realise itself in history. As another early writer put it:

> "This universality in which all opposites meet, this harmonious unity in which all aspects of European genius are united is precisely our national genius. It recalls the universal character of ancient Rome, without, however, its abstract form. This forceful, variegated and complicated nature requires a long and difficult undertaking to complete itself.

[34] 1805–1872. See especially his *Doveri dell'uomo*, 1840–1842, transl. by Venturi.

[34a] Professor Gaetano Salvemini writes in his article on Mazzini in the *Encyclopedia of Social Sciences* that Mazzini's work has strongly influenced nationalism in Poland, Bohemia and Yugoslavia, and that Wilson's doctrine of self-determination of peoples derives from him.

[35] (1801–1852).

[36] 1843. This book was a powerful force in the nationalist movement of 1848; for Gioberti's influence on Gentile see Gentile "*Il Realismo Politico di Gioberti*" in 2 *Politica*, 20–36, 161–178 (1919).

[37] Gioberti, *Sul Progresso*, Ch. III, transl. in Schneider, *op. cit.*, 21.

> It must struggle not only with other people but with itself. To really be, it must overcome itself. Hence it is not without reason that Italy has been the last to be seated at the table of the nations and that Italy must still struggle for mastery over itself."[38]

With but slight adjustment to meet the passing of years and in particular those following the fascist march on Rome, this Hegelianism is the equipment of the outstanding philosopher of Fascism, Giovanni Gentile.[39] The greatness of Italy, obscured for a time after the fall of the Western Empire, arose again with the power of the Church and the Holy Roman Empire, was then obscured until the creation of Italian unity, when it emerged only to be again obscured by the principles of political democracy of Western Europe. Fascism is the final flower of Italian nationhood, and all that is demanded by the greatness of the nation, is not only justified but is a sacred duty to the world.

Even as Germanism, inspired by Savigny's *Volksgeist* had turned fiercely upon the transalpine strains in its blood, so Italianism, with the irony that only history can handle so delicately, used the Hegelian dialectic to condemn the influence of German philosophical and political ideas upon the reborn Italian people.

It is only in this bastard form that Hegelianism has influenced fascist theory. The outstanding Italian philosopher of Neo-Hegelianism, Benedetto Croce, is, as is well known, not favourably disposed towards the fascist regime. In fact, one of Croce's greatest contributions to Hegelianism has been to display by ruthless analysis the philosophical fallacy upon which Hegel's attempt to force the facts of human history into the categories of his system was based. History, said Croce, in his *What is Living and What is Dead in the Philosophy of Hegel*, is capable of being treated philosophically, but that does not mean that philosophy and history are identical. The idea cannot evolve dialectically in time and space, for the simple reason that events in time and space stand as mere contrasts and not as opposites to each other, and the dialectic is only applicable to opposites.[40] As a result "whilst from the Hegelian school there came a line of great historians, from this same school there escaped the most petulant and the most comic contemners of history and of the facts that the world has ever seen."[41]

[38] Transl. *ibid.*, 22.

[39] 1875. Professor of Philosophy at the University of Rome. See mainly his *Che cosa è il Fascismo*, 1925.

[40] Chapter VII.

[41] French translation by Burot, p. 121.

Croce must have had in mind in writing these last words some of the crude attempts that had already been made before this time to give a Hegelian interpretation of Italian history. In any case it must be emphatically asserted that he himself is not in the line of the naïve interpretations of the history of the world which have now culminated in Giovanni Gentile's demonstration of the inevitable emergence of Italy to its present sublime condition. The furthest in the direction of "Italianism" that Croce ever went was to show that Giambattista Vico, the Italian philosopher of the eighteenth century, had come very near to perceiving and stating the unity of opposites which is the kernel of Hegel's philosophical method.[42] This critical and sceptical attitude of Italy's greatest Neo-Hegelian, stands in striking contrast to the enthusiastic use of the Hegelian interpretation of history for the exaltation of the nation.

IV. The Exaltation of "the Strong State"; Links with Bodin, Hobbes, Machiavelli and Hegel

The role of the state with regard to economic organisation implicit in the corporative idea involves of necessity an efficient and centralised machinery of government. This fact is undoubtedly one of the reasons for the emphasis placed by Fascism upon the ideal of the Strong State. In this respect that idea has been as operative in democratic countries as in fascist Italy. A state organised for economic efficiency and a system of law which has that as its supreme end would still recognise the satisfaction of the wants of human beings as the prime concern of social control. Marxian communism in spite of its superficial anti-individualism makes the economic well-being of the individual human being the ultimate objective of social organisation. The theory of Duguit similarly leads to the identification of state and law with the efficient organisation and operation of the system of economic production.

But the exigencies of the economic programme are not the only factors contributing to the fascist idea of "the Strong State." The exaltation of the nation has contributed as much or even more. Italy is a homogeneous state from the national point of view. It is not afflicted save in the Tyrol and Istria, and there not seriously, with the problem of minorities. As a result the state tends to be viewed as the organ of the spiritual entity which is the nation. As Mussolini said soon after coming into power:

"Our one aim must be the erection of this single, unified

[42] *Ibid.*, 36.

being, the nation-state, the sole bearer of the whole history, the whole future and the whole power of the Italian people."[43]

All the sanctity of the nation is thus transferred to the state, and in that transfer one further step is taken away from the democratic notion that the state and law are but means of satisfying the wants of human beings. If the nation is an abstraction from the human beings who compose it, the state is but an abstraction from the nation. The Strong State as a means to economic efficiency becomes the "stato etico," an end in itself.

In the words of Alfredo Rocco, one of the most eminent of Italian lawyers, and one of the most intelligent men in high office in fascist Italy:

> "The fascist state is the state that brings the legal organisation of society to its maximum of power and coherence. And society according to the fascist idea is not a mere sum of individuals, but an organism having its own life, its own ends, transcending those of individuals, and its own spiritual and historic value. The state, too, the legal organisation of society, is, according to fascism, an organism distinct from the citizens who at any given time compose it, and has its own life and its ends higher than those of individuals, to which those of individuals must be subordinated. The fascist state is therefore the truly social state. . . ."[44]

Or again, as it is put in the first article of the Labour Charter:

> "The Italian government is an organism having ends, life and means of action superior to those of the separate individuals or groups of individuals which compose it. It is a moral, political and economic unity that is integrally realised in the fascist state."

Or in Mussolini's famous phrase:

> "Everything for the state, nothing outside the state, nothing against the state."

There is another aspect of this idea of the strong state which deserves special mention. The important influence which Italian humiliation at Versailles has had both in the whole fascist adventure and in the development of its theory is very significant. One of the most insistently stressed ends of Fascism is to build up the nation for war. As Nietzsche recast society for the comfort of the warrior, so Mussolini has repeatedly taken the stand that the lives of individuals must be moulded by the exigencies of war-like

[43] *Popolo d'Italia*, Jan. 2, 1923.
[44] *La Trasformazione dello Stato*, p. 16.

adventure. The encouragement of propagation by bounties and other devices goes on side by side with the vigorous drive for more territory upon which the increase may be settled. Only a desire for a strong state either for its own sake, or for purposes of war, can resolve such a paradox. Such a policy can in no way be grounded upon the claims of the individual human beings as such.

"Adoration of the state" is not a new occupation. Bodin adored his "souverain," Hobbes his "Leviathan," Machiavelli his "Prince." Almost always such a phenomenon is either in reaction from civil dissension or in celebration of the achievement of national unity. Italy has been no exception to the rule. Gentile's *stato etico* is a rationalisation of the alleged achievement of national unity by Fascism[45] after repeated failures in foreign policy and serious dissension at home. This element of fascist thought has undoubtedly arisen more from the facts than from any particular pre-existing theories. Nevertheless it is certain that its matter of fact acceptance in Italy in the twentieth century is due to the long and respectable body of authority that could be vouched for it, and undoubtedly Machiavelli has influenced Mussolini himself considerably. He figures prominently in Mussolini's list of prophets of Fascism.[46] It is more than probable, too, that the absolutist strains in Hegel, which became real in the policies and diplomacy of Bismarck, were not without influence, though that influence is unavowed.

Alfredo Rocco has suggested other origins for this ideal of the Strong State. He says:

> "The fascist state is the truly sovereign state, dominating all the forces existing in the country and subjecting all to its discipline. . . . This theory of the sovereign state is really not new, for the whole legal school of public law professes it. This school has always taught that sovereignty is not of the people but of the state, a principle asserted in all the writings of all the teachers of public law, foreign and Italian, and also of our jurists, who then called themselves liberals or democrats in politics, without really raising the doubts implied by the patent contradiction in which they became involved. . . . Superiority of ends, supremacy of force: these terms sum up the idea of the fascist State. The whole new fascist legislation tends to realise this conception of the state. . . ."[47]

[45] It is of course more than arguable that this unity was fully achieved before the appearance of Fascism.

[46] Mussolini has written the preface to a new French edition of "The Prince."

[47] Rocco, *La Trasformazione dello Stato*, pp. 18–19.

It may be true as Rocco says that this theory is reminiscent of the whole legal school of public law.[48] It sounds like the theory of the Austinians in England and America, and of Laband and his followers in Germany. But the difference is more significant than the similarity and cannot be over-emphasised. With Austin, for instance, the theory of sovereignty is a theory of the nature of law and of the competence of the state. It is a formal theory, having nothing to do with the ends and purposes of state activity. In fascist thought, however, it is impossible to separate the formal theory of sovereignty from the philosophical theory of the Strong State or more emphatically the *stato etico*.[49]

V. Irresponsibility of the Head of the State to the People: Links with Machiavelli, Hegel, Nietzsche, Kohler

As Rocco suggests, the theory of sovereignty of the state as a theory of the omnicompetence of the state is not a peculiarly fascist theory. The difference between Fascism and democracy in this connection lies in Fascism's attempt to convert formal omnicompetence into factual omnipotence, and in the attribution of that factual omnipotence to one person free of responsibility to and beyond either the legal or the *de facto* control of the people. The machinery of the fascist state consists of a hierarchy of officials culminating in one man who *legally* as well as *de facto* does what seems best in his eyes. In a democracy the public official is an agent, in fascist Italy he is a superior being.

The hierarchical idea has been prominent in jurisprudence ever since Austin, and to-day has been given great emphasis on the Continent in Kelsen's reduction of the state to a hierarchy of norms.[50] Though superficially similar to the hierarchical idea of Kelsen, however, the fascist hierarchical idea is really radically different. It is a hierarchy of persons, not a hierarchy of norms. An able commentator[51] has stated that Mussolini's earliest ideas of political reconstruction after the war were all modelled on army patterns. Certainly there is plausibility in this if the general

[48] It may be noted, however, that behind this theory has almost always been an admission of ultimate popular sovereignty.

[49] Since the present article is dealing with ideas as such we may refrain from mentioning the further possible criticism that "the State" in the actual operation of Italian economics and politics tends to become identified with the fascist party and its leader.

[50] For Kelsen's latest statement see his *Reine Rechtslehre*, 1935, and his articles in 50 L.Q.R. 474, 51 L.Q.R. 517.

[51] Schneider, *The Making of the Fascist State*, p. 104. Cf. the similar suggestion often made as to the connection between John Austin's military career and his insistence upon an imperative theory of law.

picture of the Italian governmental hierarchy is brought to mind. Shortly after he came into power Mussolini said:

> "The work of fifty years of history and above all the war have made a nation out of the Italians. The historic task that awaits us is to make this nation into a national state. This is a moral idea that finds embodiment in a system of responsible hierarchies, whose members from the highest to the lowest feel the pride and the privilege of doing their particular duty. . . .[52]

The form in which this aim has been achieved is too well known to need description here. The effective political structure of Italy, including its law, has as its *ultimum mobile* one human being responsible only academically speaking to the Crown. The law-making of even the reformed legislature is subordinated to the law-making power of Il Duce. His decrees have the force of law and need not be laid before the legislature for two years after promulgation.[53] *Nec sub deo nec sub lege sed sub homine* would be a motto which fascist theory would not repudiate, but on the contrary extol. To the efficiency and power of the state all other ends must be subordinated, and the head of the hierarchy is the sole judge of what that efficiency and power requires. This is rationalised in various ways, the most striking and the most hackneyed being the assertion that a nation like any other organic being must have a head and a "will" which controls the motion of the other organs. The only difference, according to fascist thinkers, between a democratic legislature and the head of the fascist state, is in the weakness and incompetence of the former.

This faith in a government of men as opposed to a government of laws is very reminiscent of the ideal prince of Machiavelli who in executing his great task of freeing Italy is a law unto himself; of the "world historical individual"[54] of Hegel who in moments of crisis appears as the instrument used by "the idea" in realising itself; of the "superman" of the later Nietzsche who combines both these characteristics and uses them in the service of *Kultur*; the "far-sighted ruler" of Kohler[55] who must have the vision to see when the jural postulates of his country's civilisation no longer conform to the ultimate ideal of civilisation, so that he can then use the law to check the momentary degeneration. It would be

[52] Mussolini, *Popolo d'Italia*, Jan. 2, 1923, quoted in Schneider, *op. cit.*, p. 104.

[53] This position is stated as at March 23, 1936, when the suppression of the Chamber of Deputies was announced. See *supra* Notes 3 and 13. It is most unlikely that the National Assembly of Corporations which is to take its place will occupy a more independent role.

[54] Hegel, *Philosophy of History*, transl. Sibree, pp. 29–37.

[55] Kohler, *Rechtsphilosophie*, Ch. III, Sec. VI, Albrecht's transl. pp. 58–59.

impossible, however, to assign credit to any one of these thinkers for the fascist theory of leadership. Their ideas had become a commonplace in literature, philosophy and politics long before Fascism was conceived. Hegel's indirect influence is undoubted, and Nietzsche as well as Machiavelli is listed among Mussolini's favourite authors.

The general effects wrought by this ideal of personal hierarchy may be seen admirably illustrated in the Italian Code of Criminal Procedure which went into effect on 1st July, 1931. Typical of the changes wrought by this Code are the merging of the powers and functions of the *juge d'instruction* and the prosecuting official, the conditioning of liability of the police for illegal acts upon the will of the Minister of Justice, the power of the executive to pick the judges to sit in the grave cases tried in the Court of Appeals for criminal matters, and serious limitations upon the facilities of accused persons to make their defence. A learned specialist on continental criminal procedure has summarised as follows the general effect of this new code:

> "The Fascist Code is in evident contrast with the old code which was inspired by democratic-liberal principles. The new code has turned over a large field of action to agents of authority and assigned them responsibility for the exercise of their powers. But the Fascists have abrogated many of the checks which were present in the old code as a guarantee against error or abuse in the use of powers. In place of the old checks, two things have been substituted. First a control by the supervision of a hierarchic superior over the acts of his subordinates, and, secondly, the confidence that the agents to whom powers are given will conduct themselves with due regard for that "duty of homage to truth and justice which is characteristic of every public official in the exercise of his functions."[56]

It is not difficult to see how naturally these principles flow from the idea of the personal hierarchy headed by a quasi-divine leader.

Conclusion

It will no doubt be readily agreed that of the four groups of ideas analysed above, that concerned with the role of law and of the state in the economic sphere holds far the greatest interest for democracies like the United States, England and France. A

[56] Morris Ploscowe, *The Criminal Procedure of Fascist Italy*, in 55 *Revue des Sciences Politiques*, 497, 522–523.

discussion of the origins of fascist theories of law would, therefore, be but a stunted thing, if it did not point out that the fascist economic legal programme is but one example of the changes wrought by economic development in the scope and machinery of social control through law the world over; that most of the changes which Fascism professes to sponsor were sponsored long before in democratic countries; that if to-day they are proceeding apace all over the world it is rather because the problems are increasing in their urgency, than because fascist programmes are being copied. In short, it must be suggested that the Italian dictatorship had to face the same problems as the government of every other industrialised country, and that its professed solutions have differed in no radical respect from those with which old-fashioned democracy was already familiar.

It is not a little significant that both Sorel's syndicalism and Duguit's social solidarity are theories which have reference to the political and legal structure of one of the oldest democracies, France. It is no less significant that both of them envisaged the continuance of representative forms of government, and that neither of them envisaged that a personal dictatorship was necessary for realisation of their programme. It should further be pointed out that Duguit considered that "the transformation" of the law and the state to meet new conditions had already largely taken place by the opening of the twentieth century. He drew all his illustrations from the existing legal institutions of the French republic. It is now suggested that what was true before the rise of Fascism in France was equally true of England and the United States; they had all anticipated in practice what has since come to be regarded as a peculiarly fascist programme.

The modern rise in Europe of non-democratic forms of government is undoubtedly linked with that development of social structure associated with the rise of the complex economically organised society. Both Communism and Fascism have as the very essence of their political philosophy the recognition of the basic role which economic interdependence plays in social cohesion. Under both, social control through law has sought to pervade every nook and cranny of economic organisation, and conversely has been coloured by that organisation.[57] In Italy and Germany as well as Soviet Russia the state has assumed two outstanding roles in this respect, first the role of master of the economic household assigning to each member its place and controlling the conduct of each to the supposed end of economic efficiency, and second that of patron, lending to the struggle for economic

[57] See e.g. Art. 2 of the Soviet Civil Code.

efficiency the encouragement and active assistance of social control through law. If on the one hand economic organisation tends to be subjugated to political ends, on the other hand the political structure itself takes increasingly the shape of a vast economic enterprise. It is because of this common feature that it is often difficult to distinguish between programmes superficially so diverse as those of Fascist Italy, National Socialist Germany, or Soviet Russia. "Corporations" and "soviets" represent fundamentally the mutual interpermeation of political and economic structure. It is not surprising that Italy has now put the nationalisation of basic industries into its programme alongside the corporative organisation of the state.

In these countries the transformation has come about through a revolutionary change in the form of government. In Russia it came about as a violent revulsion against the most autocratic, non-democratic, political system that pre-war Europe had known. For that reason it has little interest for us, since it can tell us little as to the compatibility between political democracy and the needs of a complex economically organised society. In many important respects the programme of German national socialism is not yet worked out, and moreover the circumstances under which democracy under the Weimar Constitution was tried in Germany were far from normal. For these reasons Italian Fascism may be regarded as the least abnormal and therefore the most instructive example of the apparent breakdown of political democracy under the task of social control in a modern industrial society.

The Labour Charter and the corporative state are among the most vaunted innovations of Italian Fascism. As to their effectiveness in practice, and as to the very *bona fides* of the attempt to realise these programmes, well-informed students have expressed serious reservations.[58] But let them be taken at their face value in order to raise the issue whether there is any vital part which a political democracy such as that of England or the United States cannot bring into being without a complete change in its machinery of government.

The answer is implicit in any enlightened survey of the transformation which law is undergoing in all complex economically organised societies. It is the answer of Diogenes to the argument that motion was impossible. Diogenes put his tub on his back and walked. There is not a single innovation, save that of the form of government, that fascists point to with pride, that cannot be paralleled by similar developments, most of them prior in time to Fascism, in democratic states. In these states we find

[58] See the literature cited *supra* Note 26.

that within the last fifty years social insurance has been well developed, compulsory settlement of industrial disputes has been put into effect, conditions of labour have been regulated even to the extent of fixing wages (which Fascism has not been able to do), living conditions have been held at least to minimum standards, universal education has been developed far beyond that of either pre-fascist or fascist Italy, all the organising technique of industry has been carried over into government and has been used for the promotion of economic progress, basic economic processes have been subjected to state control and been the object of close state supervision, and in some cases have been altogether removed from the sphere of private enterprise. Even such extreme measures as legal control of human reproduction, in the interest of eugenics, have been found compatible with political democracy. The list does not purport to be exhaustive.

Let it be assumed therefore that the paper achievements of Fascism are to be taken as the standard of the change which social control through law must undergo to meet the needs of a complex economically organised society. Even then it is impossible in face of actual past achievements to draw any conclusive generalisations as to the limits of democratic efficiency. Doubts as to whether a particular democracy can adapt itself to the new world can only arise from its own peculiar characteristics, and not from inherent limitations upon democracy in general.

As to this each man must do his own speculating. The writer's opinion is that so far as England and the United States are concerned they are giving Diogenes's reply to the challenge. As to England the answer is more confident than as to the United States, both because of the absence of a rigid constitution, and because of the comparative freedom of the political machine from economic control. As to the United States there is perhaps more room for doubt. It may be that, as some assert, the maze of checks and balances of the political machine complicated by the long tradition of control by organised economic interests renders it incapable of the direct and effective action necessary for a satisfactory adjustment. But it is undeniable that tremendous adjustments have already been made despite these disadvantages. Constitutional interpretation and organised interests have in the past done little more in the United States than halt for a few years the progress of earlier social legislation. There is no strong reason why they should prove more obstinate in face of what the future has to hold. The constitutional history of the recent social legislation of President Roosevelt's administration confirms, on the whole, this judgment.

Thus far it has been suggested that the fascist governmental machine, by its exaltation of the strong state, and of the strong man as final arbiter of what the strong state demands in the way of social adjustment, is only attempting to do what every complex economically organised society has found it necessary to do. But the negative side of Fascism must be pointed out if a fair picture is sought. The strong state is not only a means of making necessary adjustments. It is also an end in itself. It is the boast of Fascism that it has substituted the state for the individual human being as the basic solicitude of social control. Although over a large field this gives little difference in results, it does in certain fields involve sacrifice of civilisation-values built up by long centuries, even millennia, of human effort.

On the cruder forms of this sacrifice, such as the use of lawless violence, the destruction of freedom of opinion and discussion, and with it the cessation of any real intellectual activity, the substitution of army discipline for self-government not only in political but in artistic and cultural life, and the abuses inevitable in the exercise of uncontrolled power by one political party, no stress need be laid. Less obvious but more important is the effect of this substitution wherever respect for human personality as such claims social protection regardless of whether the strength of the state, or its economic efficiency, are furthered by that protection. In assuming its new role in the economic order the democratic state has not abandoned its long-standing concern for human personality as such. Thus, the tendency has been to maintain the safeguards of persons accused of crime, and to regard the problem of the convicted criminal as one of restoring him whenever possible to the status of a useful member of society. But the fascist exaltation of the state has reversed these tendencies. The destruction of the most elementary safeguards of accused persons by the Italian Code of Criminal Procedure has already been mentioned. The corresponding abandonment by both National Socialist Germany and Fascist Italy of the modern approach to the treatment of convicted criminals, and their reversion to the retributive theory of punishment, does not require elaboration.[59] The recriminations between scientific experts of democratic and fascist states at the 1935 International

[59] See the address by the German Reich Minister of Justice at the International Penitentiary Congress, 1935, quoted in Lawes, *Humanising our Prisons*, in 2 *Vital Speeches*, 90: "We now emphasise in the case of every criminal act the transgression against the community, we demand that the offender shall be responsible to the community, and we regard it as the task of the criminal law to express the moral responsibility of the offender to the community. By the punishment, however, we impress upon the offender that he has severed his connection with the community and violated its interests."

Penitentiary Congress in Berlin[60] is more eloquent than a detailed account of penal treatment would be. Lewis E. Lawes, Warden of Sing Sing Prison and one of the American delegates to that Congress has recently said that the theories expounded "not only shock me deeply" but signalised "in the third Reich, a return to methods which he had long thought obsolete."[61]

Were it established that social efficiency in the modern world involved the discarding of democratic governments it might be argued that the danger of making the state into an end in itself is worth running. There is every reason on the facts, however, to believe that political democracy can assume, and indeed has already assumed, its new role in its own way. If this is so what remains of fascist theories is a dire warning of the incidental sacrifices that have to be made in any country where democratic institutions fail or are not permitted to meet adequately the challenge of a complex economically organised society.

[60] Concerned mainly with the *ex post facto* creation of crimes by legislation and by exercise of judicial discretion.
[61] 2 *Vital Speeches*, 90.

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CHILD-KILLING IN ENGLISH LAW

1. Introductory

THE history of the law relating to child-killing possesses far more interest than a cursory acquaintanceship with the subject would suggest. A complete account of its development must necessarily involve a consideration of several other topics which are still of importance in the unreformed state of our criminal law.

It illustrates, in the first place, how the "antient subtility" of the law, particularly in its definition of the term "person" for the purposes of the law of homicide, left a wide gap through which many malefactors walked with impunity. That definition is still of importance to-day. The narrative must then proceed to describe the characteristic attempts of English Law to hinder transgressors by the device of stretching across this gap in its defences parts of the ancient equipment on other sectors of its front against criminals. Despite the very unsatisfactory results of this method of procedure, it was not until the 'twenties of this century that the sensible suggestion prevailed that new defences should be raised. Whilst the law was striving with the problems presented by this ancient gap, another nearby part of its front began to crack very ominously. The widespread dislike of the application of the law of murder in all its severity to cases of infanticides by mothers led to such a divorce between law and public opinion that prisoners, witnesses, counsel, juries and even many of H.M.'s judges, conspired to defeat the law. The resulting breakdown was in many ways more serious and complete than that witnessed earlier in the nineteenth century when the public revolted against the severity of punishments for larcenies or against the attitude of the law and of the Bank of England towards forgeries of bank-notes. The history of the attempt to grapple with these two allied problems of the ancient gap and the new breakdown is most instructive. It proceeded for sixty years before the statute-book was affected and cannot yet be said to be ended. A mere enumeration of the difficulties which hindered the reformers would in itself constitute a commentary upon human weaknesses; the list of the attempted reforms provides a fine illustration of human persistence. Success was delayed not merely by the opposition of narrowly conservative views and the refusal of politicians to allot time to non-vote-catching measures but also by the failure of the reformers themselves to arrive at a correct or an agreed analysis of the existing legal situation and by the resulting confusion of ideas and proposals. For an appreciable

period after the evils of the state of the law had been painfully realised, the two topics of what we now know as "Child Destruction" and "Infanticide" were much confused; persistent attempts were made to deal with them jointly and not separately, as was done in 1922 and 1929. The confusion was rendered greater by the proposals that the evils of the law should be met not by any change in its substantive provisions but by an alleviation of its harshness through the exercise of judicial or executive discretion—a type of suggestion which has delayed the reform of English criminal law on many occasions and which is not unlikely to do so again in the future.

The subject of the law relating to child-killing attracted the attention of those interested in the reform of the criminal law generally and, particularly, of the Law of Homicide. Hence, in tracing its history one cannot avoid touching upon the courses of several great movements for law reform in the nineteenth century. Many of them involved a prodigious expenditure of human efforts which hardly deserved the abortive fate which the circumstances of the times decreed for them. Recalling the attention of the present generation to the exhaustive reform proposals of men like Russell Gurney and Fitzjames Stephen is not a mere academic leisure-hour task. If the attention of the Law Revision Committee is directed in the future, as it has not been to date, to the unreformed state of the criminal law, we may yet witness the spectacle of the dust of fifty years being wiped off the British Parliamentary Papers in which are deeply interred the remains of the Victorian proposals. No complete account of the development of the law relating to child-killing could neglect the information contained in the Parliamentary Papers—a valuable but much neglected source of legal history.

A review of the reform proposals is necessary for a modern purpose. When the Infanticide Act, 1922, was finally enacted, it was generally thought that it had terminated an unhappy chapter in the history of the criminal law. But the Court of Criminal Appeal has seen fit to re-open it. By its adoption in 1927 of an interpretation of the Act which, in effect, seriously emasculated its provisions, the Court illustrated, in a type of case peculiarly likely to touch the cords of human compassion, the oftentimes mischievous limitations of our modern counterpart of the "antient subtility"—the adopted canons of statutory interpretation. Consequently, reform proposals have once more been advanced in respect of this part of the law, some of them from the Bench and others from laymen. The former, in particular, show little appreciation of the historical background of

the reforms of 1922. A review of that background may, therefore, be of value before the next reform of the law of infanticide is attempted. One such effort, the Infanticide Bill, 1936, has already failed, its promoters being frustrated by an event stranger than any of the vicissitudes which baulked their Victorian predecessors. The Abdication from the Throne, which occurred when this private Bill was due to reach the stage of a Second Reading in the House of Commons, effectually killed the hopes of its sponsors for the present. There is little prospect that Parliamentary time will be given in the near future to the subject. Consequently, there is ample time to consider what the nature of the reforms should be and there will be little excuse for advancing proposals which entirely ignore the lessons of the past on this subject.

2. The Law as it was

The task of tracing the historical antecedents of the felonies of Infanticide and Child Destruction involves a preliminary review of a section of the law of homicide which is still in operation, namely, the law on the question of who can be the victim of homicide. An investigation of the subject discloses that the law is not quite so settled as the text-books suggest that it is.

The Test of a "Person in Rerum Natura"

Commenting on the requirements in Coke's famous definition of homicide, that the victim must have been *in rerum natura*, Stephen remarked—

> "The line must obviously be drawn either at the point at which the fœtus begins to live, or at the point at which it begins to have a life independent of its mother's life, or at the point when it has completely proceeded into the world from its mother's body. It is almost equally obvious that for the purposes of defining homicide the last of these three periods is the one which it is most convenient to choose. The practical importance of the distinction is that it draws the line between the offence of procuring abortion and the offences of murder or manslaughter, as the case may be. The conduct, the intentions, and the motives which usually lead to the one offence are so different from those which lead to the other, the effects of the two crimes are so dissimilar, that it is well to draw a line which makes it practically impossible to confound them. The line has in fact been drawn at this point by the law of England." [1]

[1] *History of Criminal Law*, Vol. III, p. 2.

The adoption of this third line of demarcation, convenient as it was, in practice has involved the law in several incidental difficulties. The first is connected with the abstruse physiological question of when an infant can be said to be completely born alive.

When is an Infant "Completely Born Alive"?[2]

On one matter in this connection there has been practically no disagreement; all the leading authorities agree that every part of the child must have emerged from the womb. This has been the view alike of the Courts and of the Criminal Law Commissioners, and the reformers of the last century.[3] Alive to the difficulties of proof, the draftsmen of the Homicide Law Amendment Bill, 1872, proposed to include within the term "person" "a child in the act of birth which has breathed."[4]

Although the umbilical cord is part of the "paraphernalia of the fœtus," the accepted view is that it need not have been severed from the child or expelled from the mother. For a time, the lack of familiarity with the facts of physiology created some doubts on the subject in the courts, as may be seen from the directions in 1839 of Parke, B., in *R.* v. *Crutchley* and Vaughan, J., in *R.* v. *Reeves*.[5] In 1842, a ruling by Erskine, J., that the cord need not have been severed, was upheld at a meeting of fifteen judges.[6] The First Criminal Law Commissioners in their 1846 report referred to the doubt existing amongst the judges and stated their preference for the view that severance need not have occurred.[7] That was the rule accepted in the preparation of the Bills and Reports of the period 1872–1880.[8]

Closely connected with the question of severance has been

[2] This topic was the subject of an exhaustive and exceedingly lively article in the *Law Quarterly Review*, vol. xx, p. 134, "Life, Birth, and Live-Birth," by S. B. Atkinson.

[3] See, e.g. *R.* v. *Poulton* (1832), 5 C. & P., 329; *R.* v. *Brain* (1834), 6 C. & P., 349; *R.* v. *Sellis* (1837), 7 C. & P., 850; *R.* v. *Trilloe* (1842), 2 Moody, 260; Atkinson, *op. cit.*, pp. 139–140; British Parliamentary Papers, 1839, 19, p. 266 (No. 168); 1846, 24, p. 127 (No. 709); 1874, 2, p. 367 (No. 44); 1878–9, 20, p. 267 (No. 2345). The pagination of the Parliamentary Papers presents a difficulty as each volume generally contains a large number of different papers. In this article the page references will be to the pages of *the whole volumes* and not to the pages of the particular documents quoted, except in the case of the Report of the Capital Punishment Commission, 1866, which itself occupies a whole volume. To facilitate reference, the numbers of the relevant documents are appended to each reference.

[4] B.P.P., 1872, 2, p. 243 (No. 289).

[5] 7 C. & P., 814; 9 C. & P., 25.

[6] *R.* v. *Trilloe*, 2 Moody, 260.

[7] B.P.P., 1846, 24, p. 128 (No. 709).

[8] See, e.g., B.P.P., 1872, 2, p. 243 (No. 289); 1874, 2, p. 367 (No. 44); 1878, 2, p. 76 (No. 178); 1878–9, 2, p. 253 (No. 117); 1878–9, 20, p. 267 (No. 2345); see the discussion between Gurney and Blackburn, B.P.P., 1874, 9, p. 521 (No. 315).

that of a separate circulation in the child. Parke, J., as he then was, said in 1833 that "there must have been an independent circulation in the child, or the child could not be considered as alive" for the purposes of the law of homicide.[9] The physiology of the matter expounded by the medical witnesses in another case in the same year was that after birth circulation from the mother proceeds for a few minutes and then ceases, whereupon an independent circulation begins in the child; severance of the cord terminates the connected circulation.[10] In 1841, Baron Gurney approved of Parke's ruling.[11] The Commissioners took the opposite view in 1846 and were followed by the reformers of 1878–80.[12] This latter line was also followed by Mr. R. S. Wright (as he then was) when he drafted the Jamaican Criminal Code in 1877, as he considered that the tests of separate breathing and independent circulation had frequently caused failures of justice.[13]

The question of proof of separate breathing seems to have been connected as late as 1866 in Victorian minds with the theological view of the emergence of the soul![14] The earlier cases ruled that proof of independent respiration was not sufficient to establish live-birth as the child may have breathed in the act of birth and died before complete extrusion from the womb.[15] A rather different view was adopted by Park, J., in 1834; he deemed proof of separate breathing unnecessary on the ground that a child may be completely born alive and yet may not have breathed for some time after birth[16]. Brett, J. (as he then was), thought that "a child is born alive when it exists as a live child, breathing and living by reason of breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother."[17] The reformers of 1872–1880 accepted the view that proof of separate breathing was not necessary.[18]

Without going further into these matters, enough has been

[9] *R.* v. *Enoch*, 5 C. & P., 539.

[10] *R.* v. *Crutchley*, 7 C. & P., 814; see the note to *R.* v. *Enoch* (*supra*) in the English Reports, vol. 172, p. 1089, apparently approving of this view.

[11] *R.* v. *Wright*, 9 C. & P. 754; see also *R.* v. *Trilloe* (*supra*, n. 6).

[12] B.P.P., 1846, 24, p. 128 (No. 709); 1878–9, 2, p. 253 (No. 117) (an amendment of the 1878 draft); 1878–9, 20, p. 267 (No. 2345). Contrast Blackburn's views in *R.* v. *Smith* (Atkinson, *op. cit.*, p. 144) and before the Select Committee of 1874, B.P.P., 1874, 9, p. 517 (No. 315).

[13] See the "explanatory memorandum" attached to the Draft Code, B.P.P., 1877, 61 (No. 1893, p. 107).

[14] See Walpole's evidence, B.P.P., 1866, 21, p. 59.

[15] *R.* v. *Poulton* (*supra*, n. 3), *R.* v. *Enoch* (*supra*, n. 9), *R.* v. *Sellis* (*supra*, n. 3); for other cases and criticism of this view, see Atkinson, *loc. cit.*, pp. 144–5.

[16] *R.* v. *Brain*, 6 C. & P., 349.

[17] *R.* v. *Handley* (1874), 13 Cox, 79.

[18] See, e.g. B.P.P., 1872, 2, p. 243 (No. 289); 1874, 2, p. 367 (No. 44); 1878, 2, p. 76 (No. 178); 1878–9, 2, p. 253 (No. 117); 1878–9, 20, p. 267 (No. 2345).

said to show that the judges of the nineteenth century wallowed in the troughs of difficult questions of physiology. Their successors do not appear to have had many opportunities for considering the question, but such pronouncements as they have made do not conduce to greater certainty on it. Wright, J., in 1901, stated, "The test of separate existence in the theory of law (whatever it might be in medical science) is the answer to the question 'whether the child is carrying on its being without the help of the mother's circulation?' If Yes! then it had a separate existence, even though it might not be fully born. If No! it had no such legal existence."[19] This cannot be said to carry the matter much further; it does not explain what is meant by the child "carrying on its being" and its reference to the child not being "fully born" seems to unsettle the law on a settled point. Channell, J., spoke in 1910 of "separate existence" without defining what constituted such existence in theory of law.[20]

Thus the adoption of the third test mentioned by Stephen for the determination of the question, "Who is a person *in rerum natura*?," has led to difficulties because the ingredients of the test itself are uncertain. We shall see later that when great dissatisfaction arose with the law of murder, full advantage was taken of these uncertainties to avoid it. Even if the test had been a certain one, it would still have left a gap in the law of offences against human bodies; its uncertainties and the difficulties of proof attendant upon its application favoured a breakdown of the law on its established fronts.

The Test in its Application to Pre-natal Injuries

As a corollary to his definition of the victim of homicide as "any reasonable creature *in rerum natura*," Coke stated—

> "If a woman be quick with child, and by a Potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child; this is a great misprision, and no murder; but if the child be born alive, and dieth of the Potion, Battery, or other cause, this is murder; for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive."[21]

Coke admitted that the authorities supporting the second

[19] *R.* v. *Pritchard*, 17 T.L.R. 310.
[20] *R.* v. *Izod*, 20 Cox, 690.
[21] Co., 3 Inst., c. 7. He based his view on Bracton, Fleta and Genesis, c. 6, v. 6, and quotes a case in Dyer (3 Eliz., fo. 186), to the effect that an inciter to the killing of a child not yet born becomes an accessory if the child is killed after it is born alive, in support of his ruling. See also *R.* v. *Shepherd*, [1919] 2 K.B., 125, on pre-natal incitement to kill a child subsequently born alive.

half of his proposition, that pre-natal injuries causing post-natal death may constitute murder, were not unanimous, but cast a doubt on the correctness of those to the contrary. Staundford, Lambard and Hale, impressed by the difficulty of proving that the death of a live-born child was occasioned by a defendant's pre-natal acts, took a different view from Coke.[22] The First Criminal Law Commissioners preferred Coke's rule and it is the view generally accepted in modern times.[23]

The Test in its Application to Pre-natal Neglect

There is little doubt that if pre-natal injuries cause the death of a live-born child the crime may amount to murder. Maule, J., in *R.* v. *West* (1848), directed the jury—

> "in point of law that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies as a consequence of its exposure to the external world, the person who by her misconduct so brings a child into the world and puts it merely in a situation in which it cannot live, is guilty of murder."[24]

The same principle had been applied in the law of manslaughter in *R.* v. *Senior* (1833). The defendant, a male midwife grossly ignorant of the art he professed, negligently compressed the head of an infant in the act of birth, thereby occasioning its death after it had been completely born alive. Despite the plea that he could not rightly be convicted of manslaughter as the wound was given whilst the child was still *en ventre sa mère*, upon a case stated the judges unanimously upheld his conviction.[25]

If the ratio of these cases be logically applied, it is difficult to resist the conclusion that pre-natal neglect by a mother, provided it be sufficient to satisfy the general test of criminal negligence, should constitute manslaughter if it causes the death of a live-born child. Counsel for the prosecution in *R.* v. *Knights* (1860), basing himself on "general principles of law," argued that the prisoner should be convicted of manslaughter if it were proved

[22] Staund., P.C., 21; Lambard, Eirenarcha, Bk. 2, c. 7; Hale, P. C., 443.

[23] B.P.P., 1839, 19, pp. 266–7 (No. 168), relying on 1 Hawk, P.C., c. 31, s. 16, 1 East, P.C., 228, and rejecting the view of Staundford and Hale, as based merely on occasional difficulty of proof. The second Cr. L. Commissioners reiterated this view and considered that *R.* v. *Senior*, 1 Moody, C.C., 346, had settled the issue, B.P.P., 1846, 24, p. 127 (No. 709). See Russell, *Crimes and Misdemeanours*, vol. i, p. 348, and B.P.P., 1874, 9, pp. 502, 551 (No. 315); 1878–9, 20, p. 267 (No. 2345).

[24] 2 Cox C.C., 500. (See the amusing reference, *arguendo*, to Fortunio Licetus, reputed to have been born a four and a half months old child and to have written a book on the day of his birth!) The same point appears to have been involved in *R.* v. *Enoch* (*supra*, n. 9), see counts 3 and 4, but no consideration by the Court is reported.

[25] *Supra*, n. 23.

that, knowing she was about to be delivered, she wilfully abstained from taking the precautions necessary to preserve the life of the child and that the child died after birth in consequence of such pre-natal neglect. But Cockburn, C. J., declared that he had never heard of such doctrine before, and after consultation with Williams, J., refused to accede to it.[26] For a time, a proposition enunciated to the jury by Brett, J., in *R.* v. *Handley* (1874), was misinterpreted so as to appear in conflict with this rule of non-liability laid down in *R.* v. *Knights* but a careful perusal of its terms clearly shows that in it his Lordship carefully limited his rule of liability to cases of *post-natal* neglect.[27] Channell, J., followed *R.* v. *Knights* in 1904 when he directed a jury that to warrant a conviction for manslaughter they must find neglect "of the child itself, treated as a separate being."[28]

When Blackburn, J. (as he then was), gave evidence before the Select Committee to consider the Homicide Law Amendment Bill, 1874, he twice referred to this omission in the law to provide for the punishment of a mother guilty of culpable pre-natal neglect and suggested the creation of a new felony to meet cases of death resulting from such neglect. In the revised version of 1880 of the Draft Criminal Code of 1878 a section provided that every woman should be guilty of a crime who, being with child and about to be delivered of it, neglected to provide for reasonable assistance in her delivery, if the child was permanently injured thereby or died just before, during, or shortly after birth, unless she could prove that the death was not caused by such neglect or by any wrongful act to which she was a party. If the offence was committed with the intent that the child should die, it was proposed that the woman should be punishable with penal servitude for life; if the intent was to conceal birth, the punishment was to be penal servitude for seven years. Proof that the offence amounted to murder or manslaughter was to be no bar to conviction under this section, but an acquittal or an indictment for this offence was to be a bar to a subsequent charge of murder or manslaughter on the same facts.[29] The Code never became law and no similar provision has been enacted. The Infant Life (Preservation) Act, 1929, relates only to "any *wilful act*" done with intent to destroy the life of a child capable of being born alive which causes a child to die before it has an

[26] 2 F. & F., 46; see also *R.* v. *Middleship*, 5 Cox 275, where Erle, J. appears to have been adverting to *post-natal* neglect.

[27] *Supra*, n. 17; see Wright, J.'s remarks on this direction in *R.* v. *Pritchard* (1901), 17 T.L.R., 310.

[28] *R.* v. *Izod*, 20 Cox 690.

[29] Cf. B.P.P., 1878–9, 2, pp. 258, 510 (Nos. 117, 170); 1878–9, 20. pp. 193. 270 (No. 2345); 1880, 2, p. 74 (Bill 2).

existence independent of its mother. The gap in the law of manslaughter still remains.

The Ancient Gap and the New Breakdown

The adoption of the complete live-birth test in the law of homicide presented the difficulty that it left the law, in the absence of the creation of new complementary offences, incapable of meeting and punishing certain scandalous injuries to those who did not come within the description of persons *in rerum natura*. The most important of these was what we now term "child-destruction." We have already referred to Coke's statement that "if a woman be quick with child, and by a Potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder."[30]

Towards the middle of the nineteenth century it was becoming very apparent that the public dislike of the severity of capital punishment, which had led to its abolition in the case of so many other felonies in the 'twenties and 'thirties, was being directed forcibly towards the inappropriateness of the death sentence as the fixed penalty for certain types of homicides, particularly infanticides by mothers. This dislike grew into resistance and every possible advantage was taken of the technicalities of proof involved in the legal definition of a person *in rerum natura* to avoid the application of the law of homicide to these cases. A full account of this refusal to operate properly the existing legal machinery must be deferred until an account has been given of the stop-gaps pressed into service to meet the deficiencies of the law.

Misprision

Coke referred to the killing of an unborn child as "a great misprision and no murder." It was probably this which Willes, J., had in mind when he gave evidence on the question of child-killing before the Capital Punishment Commission of 1866—

> "I take it that the law is that an injury inflicted upon a child which has not actually been born into the world, causing death before it has been born into the world, even though it has breathed, does not constitute murder . . . ; it is right to say that there is authority to the effect that in such cases the mother is guilty of what is called a misprision, but the law of misprision is antiquated, and in truth you will never find an indictment in practice except for concealment or for

[30] *Supra*, n. 21.

murder. If that law of misprision could be revived, and if an injury inflicted upon a child unborn could constitute an offence of that description, which would give rise to doubt, the Judge would not be able to inflict an adequate sentence, because the Acts which affect hard labour do not apply, and you could only impose a sentence of simple imprisonment. But practically I think it must be taken that there is no law applicable to that case by reason of the obsolete character of the law of misprision."[31]

Abortion

It is equally evident that the law relating to abortion could only be of small service to cover offences outside the scope of the law of homicide. An essential ingredient which must be proved in the offence of attempting to procure abortion is the intent to procure miscarriage.[32] Reference has already been made to Stephen's statement that "the conduct, the intentions, and the motive which usually lead to the one offence are so different from those which lead to the other, the effects of the two crimes are so dissimilar, that it is well to draw a line which makes it practically impossible to confound" the two offences of abortion and homicide.[33] Nevertheless, Baron Bramwell adverted in 1866 to the possibility of an indirect utilization of the law of abortion to catch those who escaped the net of homicide—

> "I desire to speak with some reserve, because I think that I am right in saying that a procurement of abortion would be an offence at common law; if it would, it seems to me almost to follow that the wilful killing of the child at the moment of delivery would be an offence at common law."[34]

When asked, "Is a woman ever practically indicted for such an offence?" his Lordship replied, "I have not known such a thing. Perhaps because, usually, they are convicted of concealment." Willes, J., told the commission,

> "I do not think that the acts against procuring miscarriage meet the point; it is not a case of abortion, it is the case of a fully-grown child; it is not to produce a birth before the natural time. I think that you must have a distinct Act of Parliament; it would be nothing new in principle; it would

[31] B.P.P., 1866, 21, p. 274.
[32] See now, 24 and 25 Vict. c. 100, ss. 58, 59; Archbold, pp. 933–5.
[33] *Supra*, n. 1.
[34] B.P.P., 1866, 21, p. 23. Russell (9th ed., p. 516) states that an unsuccessful attempt to effect the destruction of a child in the womb appears to have been treated as a misdemeanour at common law and cites a precedent in 3 Chitty Cr. L., p. 798, procured from the Crown Office, Mich. 42, Geo. 3.

be giving effect to what is stated in the books, that the injury to a child before it is born is a great misprision."[35]

Concealment of Birth

The offence most pressed into service to fill part of the gap later to be largely closed by the creation of the felonies of Child Destruction and Infanticide was that of concealment of birth. As it did not involve the same difficulties of proof of live-birth as homicide did, and as it became an alternative verdict on an indictment for murder, it was a convenient stop-gap. It played such a notable part in the administration of the law in the nineteenth century, and its origins are so directly attributable to the ancient deficiencies of the law of homicide, that some account of its history is very relevant to our subject.

This offence originated with the statute 21 Jac. 1, c. 27, which recited and enacted as follows:

> "Whereas many lewd Women that have been delivered of Bastard Children, to avoyd their shame and to escape punishment, doe secretlie bury, or conceale the Death of their Children, and after if the child be found dead the said Women doe alleadge that the said Children were borne dead; whereas it falleth out sometymes (although hardlie it is to be proved) that the said Child or Children were murthered by the said Women their lewd Mothers, or by their assent or procurement: For the preventing therefore of this great Mischiefe, be it enacted by the Authoritie of this present Parliament, That if any Woman after one Moneth next ensuing the ende of this Session of Parliament, be delivered of any issue of the Body, Male or Female, which being born alive, should by the Lawes of this Realm be a bastard, and that she endeavour privatlie either by drowning or secrett burying thereof, or any other way, either by herselfe of the procuring of others, soe to conceale the Death thereof, as that it may not come to light, whether it be borne alive or not, but be concealed, in every such Case the Mother soe offending shall suffer Death as in the case of Murther except such Mother can make proffe by one Witnesse at the least, that the Child (whose Death was by her soe intended to be concealed) was borne dead."[36]

[35] B.P.P., 1866, 21, pp. 275–6.

[36] This was not an Irish Act as stated in Russell, at p. 348, n. 2. An Irish Act of the same nature was passed in the reign of Anne and repealed together with this Stuart Act by 43 Geo. 3, c. 58, s. 3. This Act was originally a temporary measure but was perpetuated by two Acts the references to which in Stephen, *Hist. Cr. L.*, vol. iii, p. 118, do not appear to tally with the collections of statutes which we have consulted. One of these Acts appears to have been the one commonly known as 16 Car. 1, c. 5.

It will be observed that the offence related only to illegitimate children and that the statute contained an extraordinary provision which was a reversion of the ordinary common law presumption of dead-birth. This presumption of live-birth was considered in Blackstone's time to "savour pretty strongly of severity," but was "nevertheless suffered because it was also to be met with in the criminal codes of many other nations of Europe; as the Danes, the Swedes, and the French." But he mentions that "it has of late years been usual with us in England, upon trials for this offence to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption, that the child, whose death had been concealed, was therefore killed by its parent, is admitted to convict the prisoner."[37]

Lord Ellenborough's Act, 1803, after reciting that doubts had arisen concerning the provisions of the Stuart Act and that it was "found in sundry cases difficult and inconvenient to be put in practice," repealed the Act and enacted that trials of women charged with murder of their bastard children "shall proceed and be governed by such and the like rules of evidence and of presumption as are by Law used and allowed to take place in respect to other trials for murder." It thus restored the presumption of dead-birth which had been excluded from the trials of illegitimate mothers for murder by the Stuart Act. The 1803 Act further provided for the offences of administering poisons or medicines to procure miscarriage. Furthermore, it introduced the alternative verdict into this part of the law by enacting that on an acquittal on a charge of murder the jury could find, if the evidence so warranted, that the prisoner was delivered of issue of her body, male or female, which, if born alive, would have been bastard, and that she did, by secret burying, or otherwise, endeavour to conceal the birth thereof and this offence was made punishable with two years' imprisonment. It will be observed that this offence was dependent on the prior charge of murder; it was not an independent substantive offence. It was limited to illegitimate mothers.[37a]

The Offences against the Person Act, 1828, extended the provisions relating to the procurement of miscarriage to cover not merely the use of poisons or medicines but the use of "any means" for the object. It extended the offence of concealment to all mothers, legitimate or illegitimate. In view of the difficulties of proof of live-birth to which we have already adverted,

[37] Blackstone, *Commentaries*, iv, p. 198.
[37a] 42 Geo. 3, c. 58, ss. 1–4.

it is of interest to note that this Act specifically provided that in relation to the offence of concealment "it shall not be necessary to prove whether the child died before, at, or after birth"—a provision which may well have been the source of suggestions made by many reformers of a later day in another connection to be considered later in this article. The alternative-verdict provisions of the 1803 Act were retained.[38]

The Criminal Law Commissioners stated in 1839 that they did not consider it proper for them to propose any alterations in an Act so recently considered by Parliament, but added that they "thought it objectionable in principle to charge one crime by the indictment, and to allow the jury to convict and the court to pass sentence for another not stated upon the record."[39] This objection was often repeated subsequently throughout the nineteenth century. Their successors were much bolder and in their 1846 Report proposed the following new provision relating to concealment: "Where any woman shall have been delivered of a child, every person who shall by any secret disposition of the dead body of such child, whether such child, died before, at, or after birth, endeavour to conceal the birth of such child, shall incur the penalties, etc." This proposal was designed to secure three amendments. The first was, by substituting "by any secret disposition" for "by any secret burying or otherwise disposing," to remove the doubts which had been raised whether the 1828 Act required some final disposition as contrasted with a merely temporary one, the Commissioners being of the opinion that the latter, as well as the former, should be included in the offence. Secondly, as the law stood, the woman only, upon an indictment of murder, could be convicted of concealing, although third persons could be indicted under 9 Geo. 4, c. 31, s. 31, for counselling, aiding or abetting the mother in so doing. The Commissioners proposed the amended form so as to make third parties indictable for the offence. The importance of this proposal was greater by reason of the third proposed amendment, namely, to bring English law into conformity with that of Scotland by making concealment an independent substantive crime, and not one always dependent on the major charge of murder, thereby abolishing the anomaly, as it then was, of the alternative verdict. "On the one hand," they said "the question of murder is never fairly considered by the Jury; and, on the other, the prisoner is embarrassed by having to apply the evidence and defence to two alternative charges at once."[40]

[38] 9 Geo. 4, c. 31, ss. 1, 14.
[39] B.P.P., 1839, 19, p. 278 (No. 168).
[40] B.P.P., 1846, 24, p. 148 (No. 709).

The Offences against the Person Act, 1861, s. 60, which governs the law on concealment to this day, incorporated these suggestions in part only. The words "by any secret disposition" were adopted, and have created difficulties and given rise to anomalies. The offence was extended to include "any person" and not merely the mother. It was made into an independent substantive offence, not dependent on a charge of murder. But a proviso to the section preserved the connection between the two offences by still keeping a verdict of concealment as a possible alternative verdict on a charge of murder.[41] By doing so, the Act perpetuated the "mischief" of defeating the law of homicide by recourse to this alternative offence. It will be convenient to observe at this point, that a verdict of concealment is now an alternative on indictments for Child Destruction and Infanticide. Since 1860 there have been many proposals of reform of the law relating to concealment of birth. The sources of some of them will be noted later in this article.

The Breakdown of the Law

It is clear from the foregoing account of the state of the law that it stood in need of reform. But the urgency of this need cannot be realized, nor the impulses to reform appreciated, without a further account of the situation which faced the reformers of sixty years ago. This situation explains the nature of the reform proposals advanced for many years before the enactment of the Acts of 1922 and 1929 and, in some measure, it also explains the provisions of those Acts themselves. The best source of information upon the whole subject is the Report of the Capital Punishment Commission of 1866.

How authoritative the Commission was may be gauged from a list we give below of some of its members and of some of the more influential witnesses who appeared before it.[42] The Minutes

[41] 24 and 25 Vict., c. 100, s. 60.

[42] The Chairman was the Duke of Richmond; amongst its members were Dr. Stephen Lushington, Judge of the High Court of Admiralty, Sir J. T. Coleridge, who had retired after twenty-three years' service as a Justice of the King's Bench, Mr. O'Hagan, then Attorney-General for Ireland, later to become the first Baron O'Hagan and Lord Chancellor of Ireland, Mr. James Moncrieff, then Lord Advocate of Scotland, later to become the first Baron Moncrieff and Lord Justice-Clerk, Horatio Waddington, a very experienced official of the Home Office, the famous John Bright and Gathorne Hardy, recently victorious over Gladstone at Oxford, in turn Home Secretary, Secretary for War, Secretary for India and Lord President of the Council. Among the witnesses before the Commission were Lord Cranworth, Baron Bramwell, Baron Martin, Lord Wensleydale, Mr. Justice Willes, George Denman, Q.C., later to become Mr. Justice Denman, author of the Evidence Amendment Act, 1869, commonly called after his name, Fitzroy Kelly, Q.C., lately Solicitor- and Attorney-General, and soon to be elevated to the position of Lord Chief Baron, Fitzjames Stephen, Q.C., as he then was, George Young, then Solicitor-General for Scotland, later to become

of Evidence which are appended to the Report of this Commission deserve greater attention than they have hirtherto received from legal historians. They are a storehouse of authoritative information not only on the question of capital punishment but on practically every aspect of the law of homicide, and particularly on the topics of constructive murder, provocation, infanticide, criminal appeals, the exercise of the royal prerogative of pardon, and the defence of insanity. The Commission is a landmark in the vast area, one might almost say, the wastes, of the reform proposals of the latter half of the last century. One of its indirect results is worthy of record. It was John Bright, after his experience as a member of the Commission, who suggested to Russell Gurney the desirability of codifying the law of homicide. That suggestion led to Gurney enlisting the aid of FitzJames Stephen in the preparation of the Homicide Law Amendment Bill of 1872–1874. The grounds for the rejection of that Bill advanced by a Select Committee of 1874 stimulated Stephen to prepare the Draft Criminal Code of 1878. Although Stephen's efforts proved abortive, their importance in the history of the criminal law during the last fifty years needs no emphasis.[43]

The evidence clearly shows that the law had completely broken down in relation to child murder. Shee, J., spoke of "the utter and hopeless failure of the existing theory of the law of murder as respects infanticide."[44] Lord Cranworth deposed that infanticide was "practically never" treated as murder. Bramwell, B., had tried nine cases of infanticide and in eight of them the prisoner was either acquitted or found guilty of concealment, and in the one exception the jury found the prisoner guilty of manslaughter. Lord Wensleydale had had a great number of cases of infanticide but never a conviction; "the woman always escaped." Byles, J., thought that practically every case of concealment was in fact a

Lord Young and Judge of the Court of Session, Sir Horatio Walpole, thrice Home Secretary, Sir George Grey, Home Secretary in the Aberdeen Coalition Government, Henry Avory, Clerk of Arraigns at the Old Bailey and Deputy Clerk of Assize for the Home Circuit, the famous Serjeant Parry, Professor Leone Levi, Professor of Commercial Law at King's College, London, and one of the pioneers of the modern science of Statistics, and Sir Mordaunt Wells, who had been Judge of the Supreme Court of Bengal and could speak with authority on the working of the Indian Penal Code. In addition, the Commission received memoranda from Blackburn, Mellor, Keating Byles and Shee, JJ., and from James Hemp, Clerk of the Court for Crown Cases Reserved and considered replies to a questionnaire submitted to almost every Government in Europe and to several of the United States of America.

[43] Leslie Stephen, *Life of Sir J. S. Stephen*, pp. 353–4.

[44] It should be observed that the term "infanticide" is used by the witnesses in its general sense, and not in its modern technical meaning after the Infanticide Act, 1922. It is clear from the evidence of the Home Secretary, Grey, for instance, that it was occasionally used to cover the killing of a child as much as six years of age.

case of infanticide, a crime which had "greatly increased and was of daily occurrence." In his view, the Courts only heard of a small percentage of concealments, as only the unsuccessful ones came before them. Avory gave some remarkable statistics illustrating the growth of the offence of concealment. The total number of committals for trial for concealment in 1834 was 44; 1835, 37; 1836, 45; 1837–41, 246; 1842–46, 333; 1847–51, 333; 1852–56, 461; 1857–61, 522; and it had been "increasing every year since." He mentioned that there were 5000 coroners' inquests held every year on infants under seven years of age. Despite these figures, there had only been 39 convictions for infanticide between 1849 and 1864, the victims in 34 of these cases being illegitimate. Since 1849 no woman had been executed for infanticide.[45]

The position in relation to child-killing as it was disclosed by the evidence before the Commission, may be shortly summarised as follows:

1. The law of homicide, even when properly administered, could not cover injuries to children who were actually born dead.

2. Juries refused to convict mothers of manslaughter where death was occasioned by post-natal neglect. We have already seen that the law itself refused to recognise maternal pre-natal neglect as sufficient to constitute the offence.

3. It was practically impossible to secure convictions for murder by mothers of young infants, largely because lay and professional opinion were out of sympathy with the law which drew no distinction between these and other types of murders. A ready method of avoiding it was discovered by taking advantage of the difficulties of proving live-birth for the purposes of the law of homicide. The obstacles inherent in the test itself were supplemented by three other factors commonly found in these cases:

(*a*) In a large number of them, only the mother herself was present at the time of birth and she alone could speak to the circumstances of the death;

(*b*) Where others were present, they refused to give evidence and took advantage of the rule against self-incrimination;

(*c*) Medical witnesses felt real difficulties in certifying positively that the child-victims had been born alive and their hesitation was increased in some measure by the aversion to

[45] B.P.P., 1866, 21, pp. 190, 231, 235. A modern flavour is given to his evidence by his agreement with the suggestion that the increased efficiency of the police might account for some of the increase in the statistics.

capital punishment which was said to be common in the profession.[46]

4. The evidence before the Commission left no shadow of a doubt on the divorce between law and public opinion, and the effect it had on the attitude of juries. In the words of Blackburn, J., "The whole sympathies of everyone seem to me against the law which treats this crime as not different from other murders." Practically every witness agreed that it was impossible to get juries to convict. "It is in vain," said Keating, J., "that judges lay down the law and point out the strength of the evidence, as they are bound to do; juries wholly disregard them, and eagerly adopt the wildest suggestions which the ingenuity of counsel can furnish. . . . Juries will not convict whilst infanticide is punished capitally."[47]

But what is more surprising is to find that the Judges faltered and that they not merely tacitly acquiesced in the methods used by laymen to circumvent the law but frequently played an active part in these conspiracies. Shee, J., hinted at it in his letter to the Commission. Denman not referring specifically to infanticide, spoke of "very many Judges who do not seem to have the fortitude (if that be the proper word) to carry [the law] into execution so far as their part of the duty is concerned." Bramwell, B., went further and said, "It is not the fault of the jury that the prisoner is acquitted. The case is withdrawn from them by a contrivance I don't presume to censure, but which certainly prevents them expressing their opinion. I will not say whether it is a right condition of things that the jury should always be told, as they always are, 'There is a possibility of this child not having been born alive, and therefore, though you have medical evidence that it has breathed, and although you have evidence to show that it was improbable that the mother could have inflicted such an injury as it died of during parturition, yet, inasmuch as there is a possibility of it'—which the medical witnesses will never negative—'therefore you must acquit her of infanticide.'"[48] There was a general condemnation of this "contrivance," which Stephen and others called "a quibble."

The disinclination of the Judges to enforce the law was further strengthened by the fact that where the "contrivance" could not or did not work they had to pronounce a death sentence

[46] Denman, Q.C., as he then was, a strong abolitionist, deposed, "You find that medical witnesses are induced to give opinions which are perfectly startling to Judge and counsel in cases where you can attribute it to nothing but the existence of Capital Punishment," B.P.P., 1866, 21, p. 103.

[47] *Ibid.*, p. 625.

[48] *Ibid.*, pp. 22, 619–20.

which everyone in Court, except generally the prisoner, knew would not be carried out. Some of the Judges felt extremely strongly on this matter. Keating, J., stigmatised the procedure as a "solemn mockery." "A system," he remarked, "which compels a Judge to pass a sentence of death not intended to be carried out, even though the facts remain unaltered, contributes to defeat the only legitimate object of all punishment—the prevention of crime."[49] Willes, J., went further. "I always endeavour," he boldly declared "to prevent people from being convicted of murder, unless I think that, not only according to law, but according to the established practice, it is the proper conviction. The commission is to administer what to justice appertains according to the laws and customs of England. I think that if, according to the established practice, a prisoner is not convicted and executed for a particular offence it is a great scandal, and ought to be, if it can consistently with truth be avoided, that a Judge should pass a solemn sentence of death upon him."[50]

For the purposes of a later section of this article, it is convenient to stress, and to stress very strongly, at this point that it was the shocking insistence of the law that this "solemn mockery" should be staged by the Judges which led to the somewhat rare spectacle in the nineteenth century of the Judges being in the van of criminal law reform. If any legislation could be described as above all others the creation of the Judges, it is the Infanticide Act, 1922. Their evidence against "the solemn mockery" in 1866 really marks the starting point of this reform; it was they who frequently made proposals for the amendment of the law during the next two decades; it was they who revived the whole question in 1908 and 1909; it was they who mostly discussed in Parliament the proposals of the Bill of 1922 after it had been cast into more or less its final form by Lord Birkenhead and his collaborators. It was a tree planted, watered and nourished by their own judicial predecessors which Lord Hewart and his colleagues lopped in the Court of Criminal Appeal in 1927.

Public Opinion and the Law

To appreciate the impulse to reform, it is relevant to consider some of the considerations which drove public opinion so strongly against the law on this subject.

[49] *Ibid.*, p. 624.

[50] *Ibid*, p. 268. That Willes, J., practised what he preached is illustrated by Sergeant Parry's evidence that "in his ruling he takes a wise and enlarged view of the law so as in some cases, to do away with the doctrine of implied malice," *ibid.*, p. 243.

There was a general feeling emphasised in the evidence of Stephen, Cranworth, and Walpole, that child murder is not so heinous as other forms of murder because of the nature of the victim. A child could not be regarded quite in the same light as a grown-up person; the loss to the child itself could not be estimated; "it were as if the child never came into the world than that, having come into it, it was murdered."[51]

Some of the witnesses stressed a point made long before by Bentham,[52] that the killing of a child by its mother did not create the same feeling of alarm in society as other forms of murder did, and public opinion, consequently, did not insist upon the death sentence as a deterrent.[53]

Generally, there was not that malignity in these cases which characterises other forms of murder. As the statistics showed, this crime was mostly committed by illegitimate mothers to hide their shame. Although Bramwell, B., and, apparently, John Bright, considered the killing of their children by mothers as an aggravated form of murder,[54] thus taking the view embodied in some of the more ancient criminal codes which were in force on the Continent, the general opinion was that the motive of hiding shame lessened the heinousness of the crime and that the execution of the law in its full severity would be barbarous. Shee, J., echoed the majority view when he stated that "the undue severity of the social and family shame which attaches in this country to a girl's unchastity" was a ground for exempting this form of murder from the operation of capital punishment.[55] It is of interest to note that the Attorney-General for Ireland deposed that there were far fewer cases of infanticide in Ireland than in England because the greater loss of caste which there followed illegitimate births resulted in fewer of them.[56]

The malice was generally less in this class of murder because also of the general state of health and mind of the perpetrators of them. The part played by this consideration in the subsequent reform proposals will be emphasised later.

There was also a widespread realisation that bad economic conditions frequently led to the commission of these crimes. A memorandum submitted to the Commission by Chief Justice

[51] B.P.P., 1866, 21, pp. 5, 57, 291.
[52] *Principles of Morals and Legislation* (Works, 1843), p. 80.
[53] B.P.P., 1866, 21, pp. 57, 291.
[54] *Ibid.*, pp. 21, 207. Bramwell's attitude is very characteristic; he took the same view on the question of the defence of irresistible impulse—the greater the temptation, the greater should be the legal deterrent.
[55] *Ibid.*, p. 628.
[56] *Ibid.*, p. 389.

Bigelow of Massassuchetts is worthy of quotation in this context. It stated:

> "As to the inquiry concerning infanticide by the mother, I can give no information, because we have no experience on the subject. I have never known an indictment to be returned in this State for the offence. The crime is a very rare one in the New England States. I attribute this mainly to the fact that, owing to the facility with which our labouring classes can acquire the necessaries and comforts of life, marriage is almost universal among them. There is, therefore, less temptation to illicit intercourse, and no difficulty is experienced in giving support to large families of children."[57]

The realization of this complete breakdown of the law, the Judges' dislike of "the solemn mockery," the considerations which had caused the divorce between law and public opinion, all these led to an agitation for reform which commanded the support of the vast majority of the witnesses heard before the Commission. The movement was strengthened by two other considerations. The first was that the example of law reform abroad had begun to affect the minds of well-informed persons. Under some foreign codes, child murder was still treated as an extra-heinous type of homicide, but many foreign countries had introduced mitigations of the harshness of the old law of murder. Holland, Italy, Hanover, Portugal, and several of the Swiss Cantons were in the van of progress in this respect. In Scotland, the prosecutor could always "restrict the libel" and the evidence of the Solicitor-General proved that this course was sometimes followed in cases of infanticide, the jury thus knowing that a verdict of guilty would not be followed by the death sentence.[58]

The other impulse to reform came from a belief, widely held but not uncontested, that the breakdown of the law had resulted in a large increase in the number of child-murders. Whether there was an actual increase or not, the official figures of the known unnatural deaths among infants were shocking in the extreme. The 'sixties, when medical science was mastering the ravages of cholera and other epidemics, did undoubtedly witness an apparent increase in child-killing. The state of the law was probably not the only factor which caused the alarming condition of affairs. Birth-control was unknown; the misery of the country-side was probably greater than that of the towns. In the days of the old Poor Law it had been comparatively easier to swear bastards on the

[57] *Ibid.*, p. 575.
[58] *Ibid.*, p. 439.

reputed fathers. The practices of baby-farming, abortion, and infanticide abounded. "The 'sixties, 'seventies and 'eighties were dotted with scandalous cases of these crimes; but for every one brought to light, hundreds of others passed undiscovered—a hideous wastage of life from which society in its impotence averted its gaze."[59] If any confirmation of the substance of this statement is required, it may be found in the revolting evidence submitted to the select Committee on the Protection of Infant Life, 1871.[60]

This was the background of the many reform proposals advanced after 1866. The remaining parts of this article will deal with the general nature of these proposals and with the present state of the law.

[59] R. S. Lambert, *When Justice Faltered* (1936), p. 72. He gives an account of one of these scandalous cases, *R.* v. *Winsor*, a case referred to seven times in *Archbold;* but it is now generally forgotten what a hideous story lay behind this decision on the law of procedure.

[60] B.P.P., 1871, vol. 7 (No. 372). Professor Sheldon Glueck in *Crime and Justice* (1936), p. 9, stresses a factor in the present state of crime in the U.S.A., which applies also to English conditions, the transition to the state of greater anonymity of city life which makes wrongdoing less subject to the criticism and control of neighbours.

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(To be concluded)

COMMON EMPLOYMENT

REFLECTIONS ON THE DOCTRINE IN THE LIGHT OF *WILSONS AND CLYDE COAL COMPANY, LTD.*, v. *ENGLISH*

1. The House of Lords has in recent times shown a remarkable capacity for taking a liberal view of some of the older and more inequitable legal doctrines. In *Wilsons and Clyde Coal Company, Ltd.*, v. *English* (1937), 53 T.L.R. p. 944, the law lords manifested a far higher degree of legal statesmanship than the Court of Appeal has displayed in similar cases. A study of the English judiciary in terms of the age of its members might throw a surprising light on the assumption underlying President Roosevelt's recent proposals to reform the United States Supreme Court.

In *Wilson's* case a miner employed underground on repair work was proceeding at the end of the day shift, between 1.30 p.m. and 2 p.m., to the pit bottom by way of a road known as Mine Jigger Brae, when the haulage plant was put in motion, and before he could reach a place of safety he was caught by a rake of hutches and injured. The jury found that a reasonably safe system of working had not been provided; that the defender's board of directors were ignorant of the matter; that their agent knew of the system and the defects inherent in it; that the system related to the technical management of the colliery and was the cause of the accident; that the workman did not fail to take reasonable care for his own safety; and they awarded £500 damages.

On appeal the Company sought to evade liability on the ground that by S. 2 (4) of the Coal Mines Act, 1911 the owner of a mine required to be under the control of a manager "shall not take any part in the technical management of the mine unless he is qualified to be a manager."

The directors of the Company had appointed an agent to represent them on the mining side of their five collieries. This agent selected a manager for each mine, the appointments being approved by the directors. The defenders argued that they could not be held responsible for a failure in technical management, since they were excluded from taking part in it by statute; and, further, that the agent was in common employment with the workmen and hence the Company was in any case not liable for his negligence.

The House of Lords unanimously affirmed the decision of the Court of Session in awarding damages to the pursuer; and in the course of doing so reviewed at length the law of common employment. It is necessary, said Lord Thankerton, to distinguish clearly between duties relating to the actual working or operation of the mine and those which relate to the conditions of safety provided by the system under which the working or operation is carried on. As regards the latter, the workman does not by implication assume any risk due to want of care on the part of managers or others, and the employer cannot rid himself of liability by transferring responsibility on to the shoulders of a subordinate. There are certain duties so vital to safety that the master cannot divest himself of liability by pleading the doctrine of common employment. If he entrusts those duties to another, the maxim applies *qui facit per alium facit per se*. There are thus, as Lord Macmillan observed, two competing doctrines, the doctrine of vicarious liability and the doctrine of common employment. The latter is relevant only where injury results from the actual working or

operation; the former applies where "system" or management is involved. Moreover, the agent was performing the duty of an owner and not that of an employee, and hence was not in common employment with the miner.

Lord Wright set himself the task of demolishing the decision of the Court of Appeal in *Fanton* v. *Denville*, [1932] 2 K.B. 309, which he condemned in no uncertain tones. The well-established, but illogical, doctrine of common employment, he said, is certainly not one to be extended and has never in its long career been pushed so far as the Court of Appeal sought to push it in that case. In *Fanton's* case the Court of Appeal limited the employer's liability to the mere engaging of competent authorities in the higher grades and then said that everything else could be left to them without further obligation. This, declared Lord Wright, is entirely inadequate. The employer has not one duty but three: the obligation to provide a competent staff of men, adequate material, and a proper system and effective supervision. The obligation to provide and maintain proper plant and appliances is a continuing obligation. It is not broken by mere misuse or failure to use such plant or appliances arising from the negligence of a fellow-workman; nor to a casual departure from the system of working due to the casual negligence of managers, foremen or other employees. The House of Lords, in Lord Wright's opinion, inferentially overruled *Fanton's Case* in their decision in *Rudd* v. *Elder Dempster & Co.*, [1933] 1 K.B. 566.

The time has clearly come when the doctrine of common employment should be abolished. It is, as Lord Wright observed, based on a principle which has little regard to reality or to modern ideas of economics or industrial conditions. It is essentially based on Adam Smith's notion that a workman's wage is nicely calculated so as to include remuneration for every risk he is required to run in his work—all the advantages and disadvantages of the occupation considered together. There is also an element of Victorian morality which insists on moral guilt being a condition precedent to legal liability—a conception entirely antithetic to the modern view of absolute liability arising from risk, now embodied in workmen's compensation and much other industrial legislation. I suggest, therefore, that the Lord Chancellor might well invite the Committee on Law Revision to report to him on the subject.

WILLIAM A. ROBSON.

2. The House of Lords in *Wilsons and Clyde Coal Co.* v. *English* (1937), 53 T.L.R. 944, has affirmed the doctrine of common employment, but emphasised that it is subject to a very important limitation. The decision establishes that if a master delegates to a servant the duty to provide a safe system of working, the master cannot rely on the doctrine of common employment if that servant fails to provide a safe system with the result that another servant is injured. The servant to whom the duty is delegated is no more in common employment with the other servants than the master would be if he performed the duty personally. Lord Wright said that "the well-established, but illogical, doctrine of common employment is not to be extended." American law reached a similar conclusion more than fifty years ago (*Han. & St. J. Ry.* v. *Fox* (1884), 31 Kan. 586; *Madden* v. *Ry. Co.* (1886), 28 W. Va. 610; *Pool* v. *Southern Pac. Ry.* (1899), 20 Utah 210).

The doctrine of common employment is derived from certain dicta in *Priestley* v. *Fowler* (1837), 3 M. & W. 1. In that case a servant sought to

recover from his master in respect of certain injuries he had sustained on the collapse of a van which had been overloaded. Lord Abinger pointed out that there was no precedent for the claim and that he was therefore free to decide according to general principles. He thought that to permit recovery in these circumstances would lead to grave inconveniences, mentioning among others the fact that a servant would be able to recover against the master for injury caused by the negligence of a fellow servant. In *Farwell* v. *Boston and Worcester Ry. Co.* (1842), 4 Met. (Mass.) 49, an American case which has been often cited with approval by English courts, the doctrine is said to rest on the voluntary assumption by one servant of the risk of injury from the negligence of fellow servants. This application of the principle *volenti non fit injuria* was adopted by Baron Alderson in *Hutchinson* v. *York and Newcastle Ry. Co.* (1850), 5 Ex. 343, and by the time *Morgan* v. *Vale of Neath Ry. Co.* (1864), L.R. 1 Q.B. 149, was decided, it had become an irresistible deduction of law.

This limitation on the vicarious liability of the master for the negligence of his servants has been criticised by many and defended by few. Among the few, however, are Professors Bohlen and Burdick and Dean Pound. They are all concerned to meet the objection that the rule is an expression of class interest. The cases establishing it were decided at a time when it was desired to attract capital to industry, and before organised labour had found an effective political voice. Pound (*Interpretations of Legal History*, pp. 109–111) argues that those who complain of the doctrine as an expression of the self-interest of the dominant class assume that the principle of the master's liability to strangers for the acts of his servants is an inevitable feature of all legal systems, whereas in fact it is not. This principle can hardly be said to favour the employer. But it should be noted that this problem does not necessarily involve any conflict between employer and employee. Moreover, it does not disprove the contention of class interest with respect to one principle to prove that another principle is free from that vice. It is an inescapable fact that at the time of *Priestley* v. *Fowler* the vicarious liability of the master had already been settled, and that for reasons which many consider obvious it was not extended to the negligence of fellow servants. Burdick ("Is Law the Expression of Class Selfishness"—25 *Harvard Law Review*, 3419) is even more ingenuous. His main argument appears to be that no trace of these dark designs appears in the wording of the judgments. Elsewhere he says in support of his own argument that the Court in *Farwell's Case* thought that "considerations as well of justice as of policy" defeated the plaintiff. Are we not justified in inquiring what those considerations of policy were? Professor Burdick having a thesis to prove assumes that they were in the interest of employee as well as of employer, and makes no further investigation beyond the blunt assertion that "the liability of a master to strangers for the negligence of a servant stands on its own reasons of policy. To extend that liability to co-servants would not conduce to the general good."

Bohlen's defence is the most able. ("Voluntary Assumption of Risk," in *Studies in the Law of Tort*.) His view is that the doctrine is not an anomalous one peculiar to the relation of master and servant. It is no more than an application of the general conceptions of the common law. One such conception is that a man is not bound by any duty of affirmative protection of others beyond indicating dangers known to him and unknown to them. If a greater degree of protection is required it must be bargained

for by contract. Bohlen is not unaware that a servant may possess little bargaining power. "This, however, was his misfortune, not the other's fault. If the relation was purely voluntary, if it was one which neither party was legally bound to enter into, they might set what terms and conditions they pleased upon its creation. That the social and economic status of the parties gave one the power to make a harsh bargain did not concern the Courts." This argument is based on the slot-machine conception of the judicial function; a judge is rarely without alternative principles to apply. It overlooks the fact that legal principles, as Green has said, hunt in pairs and often packs. In other cases Bohlen himself points out that the Courts have considered themselves free to evade the individualist doctrine that a plaintiff who faces a known risk absolves from liability the defendant who created it, e.g. *Clayards* v. *Dethick* (1848), 12 Q.B.D. 439; *Osborne* v. *L.N.W.R.* (1888), 21 Q.B.D. 220; *Thrussell* v. *Handyside* (1888), 20 Q.B.D. 359. One might mention in addition the plaintiff who moves to a known nuisance, and the plaintiff who undertakes the rescue of another (e.g. *Haynes* v. *Harwood*, [1935] 1 K.B. 146).

Furthermore, on other occasions the law does not view with such complete imperturbability the absence of bargaining power in one party. Thus, carriers have a monopoly of transport and are therefore in a position to impose what conditions they please in contracts of carriage. But the law has intervened here to protect those in an inferior economic position by exempting them from unreasonable terms to which they have agreed. (Railway and Canal Traffic Act, 1854, sect. 7.)

Professor Burdick's fine simple faith in the judges can be shaken by nothing less than a forthright admission by them that they are capable of favouring one class of the community at the expense of another. No less a judge than Lord Justice Scrutton has made this admission. (*Cambridge Law Journal*, Vol. I, p. 8.) In disputes between Capital and Labour, he says, a judge may be incapable of preserving a strict impartiality, no matter how sincere may be his desire to do so. He shares the traditions, education and outlook of one of the litigants, and he may find himself unable to transcend this sympathy. Specific examples of this tendency may be found in the Reports. In *Hilton* v. *Ekersley* (1856), 6 E. & B. 47, the question was whether an agreement between employers was in undue restraint of trade. Baron Alderson gave as one reason for holding it illegal that "if a bond of this sort between masters is capable of being enforced in law, an agreement to the same effect amongst workmen must be equally legal and enforceable, and so we shall be giving legal effect to combinations of workers for the purpose of raising wages and make their strikes capable of being enforced by law." Crompton, J., agreed, as also did Lord Campbell who referred to the arrangement as "very laudable," since it was designed to put down an association of workmen. In *Ilott* v. *Wilkes* (1820), 3 B. & Ald. 308, the plaintiff had been injured by a spring gun set by the defendant. Best, J., refused to hold the defendant liable, since "if you do not allow men of landed estates to preserve their game, you will not prevail on them to reside in the country." But in order to dispel any suspicion that landowners are being favoured he proceeds sanctimoniously to point out that "their poor neighbours will thus lose their protection and kind offices; and the Government the support that it derives from an independent, enlightened and unpaid magistracy." In fact, a careful reading of even Lord Abinger's judgment in *Priestley* v. *Fowler* will reveal a certain partiality. He holds that since the case is to

be decided by general principles he may look at the consequences of holding the master liable, and finds that the resulting inconvenience precludes him from affirming this liability. He reinforces this decision by pointing out that servants will be induced to exercise greater care for their mutual safety and will thereby the better discharge the duty they owe to serve the master's interest.

It is interesting to examine some of the other reasons which have been advanced as the basis of the rule. It has been said that there was no precedent for fixing the master with liability, but Professor Winfield has proved that novelty does not dispose of the possibility of recognising a new cause of action. Others have said that the servant is paid more highly for undertaking the risk, but this has "little regard to reality or to modern ideas of economics or industrial conditions." (Lord Wright.) Some judges have justified the doctrine on the ground that the servant is a partner in the undertaking, but, it should not be forgotten that it is principally for the master's benefit that the risk is imposed. As has been said, the technical reason for the rule is the principle *volenti non fit injuria*. It must be clear to all lawyers by now that this is a feeble fiction adopted to clothe with legal argument a balancing of interests already struck by the judges in favour of the employer. It is a conception derived from that period when a few servants worked with simple tools under the personal supervision of their employer. The workman who to-day engages in a huge industrial undertaking is almost completely unaware of the nature and number of the risks to which he is subjected. It is absurd to say that he voluntarily assumes these risks. It has been repeatedly said that since he enters the employment of his own volition he must be taken to have impliedly assumed the risks. This, too, is a relic of the period when the supply of labour did not as now far exceed the demand. A workman has little freedom of choice to-day when there are one to two million men from whom his employer may choose a substitute. Nevertheless, the fiction of voluntary assumption of risk persists, so that where the inmate of a workhouse was compelled to work with the defendant's employees he was held not to be debarred from recovering for their negligence (*Tozeland* v. *Guardians of the Poor of the West Ham Union*, [1906] 1 K.B. 538). If we must pay lip service to this fiction is it not possible to hold that volition is destroyed by such provisions as sect. 28 of the Unemployment Insurance Act, 1935, by which an employee is disqualified from receiving benefits if he refuses or fails to apply for work. Where the doctrine of common employment does not apply a true voluntary assumption of risk must be shown, and fear of losing his job has been held to destroy a workman's volition. (See *Yarmouth* v. *France*, 19 Q.B.D. 647, *Thomas* v. *Quartermaine*, 18 Q.B.D. 685,—particularly Lord Esher and Lindley, L.J., *Smith* v. *Baker*, [1891] A.C. 325, *Williams* v. *Birmingham Co.*, [1899] 2 Q.B. 338) "In England the pressure of the servant's necessities has finally come to be regarded as destructive of his free will when placed in a position where he must either encounter some probable though not imminently threatening danger, or else give up his employment." (Bohlen, *Voluntary Assumption of Risk*.)

It is disreputable to base the doctrine on the voluntary assumption of risk to-day. This was appreciated by Collins, M.R., in *Burr* v. *Theatre Royal, Drury Lane, Ltd.*, [1907] 1 K.B. at p. 555. The argument had been addressed to him that as the doctrine applies by reason of an implied term in the contract of employment, if the contract expressly exempts the

employer from liability for some forms of the negligence of fellow servants, it prevents the doctrine from applying to other forms. "I think that this argument pushes the idea of implication in this connection too far," said the Master of the Rolls, "that idea has, in relation to this subject, been introduced in the attempt to analyse the grounds of a well-established rule of law. We are here dealing with a positive rule of law with regard to the relation of employer and employed which is really based upon considerations incidental to that relation rather than on any actual intention inferred to have existed in the minds of the parties in the particular case."

Certain limitations have been imposed upon the rigour of the doctrine. (1) The defence is not available under the Employer's Liability Act and Workmen's Compensation Acts. Labour agitation succeeded in imposing this change of policy upon the law by the turn of the century in which the doctrine was established. (2) The defence is not available where the employer is subject to certain absolute statutory duties to ensure the safety of employees. (3) The employer must provide competent fellow servants, safe plant and premises and a safe system of working. These, however, are not absolute duties, since he need merely exercise care and skill in their observance. But they are distinct duties, as *Wilsons and Clyde* v. *English* emphasises, and they are not discharged by appointing a delegate to perform them. (To permit this would be to reduce them to the single duty to provide competent fellow servants.) In spite of these limitations, however, the doctrine is still capable of working considerable hardship, e.g. where the servant seeks more compensation than he can obtain under the Workmen's Compensation Act. There is a widespread conviction in the profession that the doctrine should be abrogated, and it may be that legislation will soon effect this. If that is so we are tilting at an already tottering windmill. We hope so. In 1934 Sir Walter Greaves-Lord introduced a Bill for the abolition of the defence, but the Solicitor-General was no more than "coldly benevolent" (*Law Times*, Vol. 177, p. 97), and the measure was still-born. The Solicitor-General objected to the Bill on the ground that the possibility of obtaining greater damages would tempt workmen to start proceedings for their recovery, with the result that the effect of the Workmen's Compensation Act in avoiding litigation would be rendered nugatory.

One feature of the decision in *Wilsons and Clyde Coal Co.* v. *English* deserves careful consideration. It is established that the duty to provide a safe system of working is distinct from the duty to supply safe plant. Not merely must the employer provide safe machinery, but he must also see that means are devised for its careful use. This has not always been appreciated and the two duties have sometimes been slurred together as one. Thus one finds cases in which the only question argued is as to the safety of plant and no mention is made of the safety of the system of working, although it is possible that damages might have been recovered under this other form of liability (e.g. *Laubach* v. *Co-optimists Entertainment Syndicate, Ltd.* (1926), 43 T.L.R. 30). It may be that if the employer proves that he provided safe plant the principle *res ipsa loquitur* will apply where damage is done on the assumption that there was no safe system of working the plant. *Grant* v. *Australian Knitting Mills*, [1936] A.C. 85 lends a certain force to this argument.

Further, it appears that this duty to provide a safe system may provide a remedy for damage where hitherto that damage has given rise to

no cause of action. As the learned commentator on *London, etc., Properties* v. *Berkeley*, [1936] 2 All. E.R. 1039, and *Anglo-Scottish Beet Sugar Corp., Ltd.* v. *Spalding*, [1937] 3 All. E.R. 335, suggested in the previous issue of the MODERN LAW REVIEW (p. 149), it may be possible on such facts as were involved in these decisions to recover for negligence in failing to provide a safe system of business organisation. It may be possible even to recover in the circumstances litigated in *Derry* v. *Peek* if the misstatements were due to negligent organisation of the defendants' business. The actual decision in that case is confined to fraud. These suggestions proceed, of course, on the assumption that a duty to the plaintiff can be found to exist.

JOSEPH GOLD.

STATUTES

The Matrimonial Causes Act, 1937

According to its preamble the Matrimonial Causes Act, 1937, was enacted for a variety of purposes, all of them highly commendable, but difficult to reconcile in view of the deep differences of public opinion with respect to matrimonial law. The objects of the Act are: The true support of marriage, the protection of children, the removal of hardships, the reduction of illicit unions and unseemly litigation, the relief of conscience among the clergy and the restoration of due respect for the law. In order to achieve these objects the Act does not confine itself to a reform of divorce law but makes in many respects much the most important inroad ever made since 1857 into matrimonial law, codified in the Judicature Act, 1925, and in the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925.

1. The question of the essential validity of a marriage appears to be somewhat neglected in the text books as well as in academic treatment. It seems that according to English law, apart from non-age, lunacy, consanguinity and existence of a previous marriage, the only grounds on which a marriage was void were hitherto mistake as to the identity of the other party or the nature of the ceremony, or threat and duress, while the marriage was voidable only in cases of physical impotence of either spouse. Section 7 adds a series of new grounds of voidability. The most important of these are certain mistakes as to the personal qualities of the other spouse. While, however, a number of continental systems of law, as for instance, the German Code (s. 1333) and the Swiss Code (Article 124) make an essential mistake as to the personal qualities of the other spouse a general ground of voidability, the new Act enumerates the types of defects which must have existed at the time of the marriage without the knowledge of the petitioner in order to make the marriage voidable. Only if either the petitioner or the respondent was of unsound mind or a mental defective or subject to recurrent fits of insanity or epilepsy, or if the respondent suffered from venereal disease in a communicable form can the marriage be avoided. There is one further ground on which a husband can avoid the marriage, namely if his wife was at the time of the marriage pregnant by another man. This provision overrules the decision in *Moss* v. *Moss*, [1897] P. 263. In all these cases proceedings have to be instituted within a year from the date of the marriage and the aggrieved party is precluded from bringing the petition if marital intercourse has taken place with his or her consent after the discovery of the defect of the other party. If one compares these new provisions with some of the corresponding provisions prevailing on the Continent, it affords another striking illustration of the fact that the discretion granted to the English judge is frequently much less extensive than that given to the judges of some Continental countries. Another ground of voidability newly introduced by s. 7 is that the marriage has not been consummated owing to the wilful refusal of the respondent. One should have thought that this would have been treated more properly as a ground for divorce as in French and German law. Possibly the influence of the Canon Law with its rules about *matrimonium ratum sed non consummatum* may have had something to do with this new enactment. It is somewhat anomalous that non-consummation caused by wilful refusal is only a ground of voidability within one year from the date of the marriage

while the Common Law does not provide any time limit for a petition for nullity based on impotence.

2. From a practical point of view the most important provisions of the Act are, of course, those referring to divorce and judicial separation. Any system of law which does not either make the marriage tie indissoluble altogether or grant the possibility of a dissolution of marriage by mutual agreement is faced by two different problems: (*a*) Should the failure of a marriage be regarded as a misfortune or necessarily as the result of the "fault" of either spouse or both spouses? (*b*) Should, whichever be the attitude towards the first question, the grounds of divorce be enumerated specifically or should the court be entrusted with the administration of a "general clause" thus giving it the discretion of adapting the application of the law to the necessities of the individual case?

As regards the first problem the new Act, like the Judicature Act, 1925, maintains as a matter of principle the "fault" theory. Mr. A. P. Herbert's emphatic pronouncement that divorce is "not a crime" has not been able to secure recognition in the Act. Only one exception is introduced: incurable insanity has become one of the grounds of divorce (Judicature Act, sect. 176 (*d*) as amended by sect. 2 of the new Act). But this new rule is surrounded with restricting safeguards, meant to protect the insane, but rather difficult to reconcile with the promise of the preamble "to remove hardship." The unsoundness of mind must be proved to be incurable and the respondent must have been continuously under care and treatment for five years immediately before the petition. "Care and treatment" is very narrowly defined by sect. 3 of the Act. The Swiss Code which so far as one can see contains the soundest system of divorce law existing on the Continent provides in Article 141 that either spouse can at any time sue for a divorce on the ground of the insanity of the other where the latter's mental condition makes life in common intolerable and is after three years duration held by experts to be incurable. It is submitted that these provisions would have better served the purpose of "protecting the children" than the one newly enacted.

No general clause has been introduced by the Act, though, as French and German law show, it would have been perfectly compatible with the "fault" principle. It is true that French law (Art. 231 C.C.) gives the right of petition for divorce only "*pour excès, sévices, ou injures graves de l'un envers l'autre.*" But this clause has been so widely interpreted by the French courts that it seems to cover precisely the same ground as the more extensively worded sect. 1568 of the German Code, which provides for divorce in any case of "*verschuldete Zerrüttung*" of a marriage (i.e. marriage ruined by either spouse's fault). The new Act, instead of introducing a clause of this kind, adds two new specified faults to the existing one of adultery, namely cruelty and desertion.

Cruelty has, of course, been a ground for separation under s. 185 (1) of the Judicature Act, 1925, and it may be that the courts, when construing the word "cruelty" (s. 176 (*c*) in its new form) will follow the decisions given in separation cases and in cases of wives' divorce petitions brought before the 1925 reform. If they do so cruelty as a ground of divorce will have a much narrower meaning than the corresponding words in the French Code quoted above and the cruelty clause will not be extended so as to become a general clause of the Continental type. Cruelty is defined (see Halsbury, *Laws of England*, Hailsham ed., vol. 10, p. 649) as "conduct of such a character as to have caused danger of life, limb or health (bodily

or mental) or as to give rise to a reasonable apprehension of such danger." It includes communication of a venereal disease and it may include bad treatment causing a nervous breakdown to the other spouse, but since the majority judgment of the House of Lords in *Russell* v. *Russell*,[1897]A.C.395, it seems to have been firmly established that cruelty does not include either the mere causing of mental pain and anguish or even insults. It is submitted that the cases decided under the old legislation do not bind the courts when interpreting the new Act. Will the judiciary supplement the work of the legislature and bring English law into line with the best drafted systems of Continental law?

The desertion clause, sect. 176 (*b*) in its amended form, will probably prove to be the most important reform introduced by the Act. Desertion must have lasted for three years immediately preceding the petition. Under the old law (sect. 185) desertion without cause for not less than two years was a ground for separation. Apparently in order to remove the incongruity of having a shorter period as a ground for separation than as a ground for divorce sect. 5 of the new Act changes the law of separation and, by making the grounds for a divorce the basis of the law of separation, extends the period of desertion which must have elapsed to justify a separation petition from two to three years. Desertion (see Halsbury, *loc. cit.*, p. 654) is the "abandonment of one spouse by the other without the latter's consent with the intention of forsaking the other." It includes the case in which one of the spouses by his or her conduct forces the other to leave the matrimonial home. If the aggrieved party instead of filing a divorce petition asks for separation and after the granting of a separation decree decides to remarry he or she will be able to present a divorce petition, based on the desertion period preceding the separation decree, if cohabitation has not been resumed. This will be so, even if separation was granted not by a decree of the High Court but by an order under the Summary Jurisdiction Acts, and in this case as well as in other cases the Court may treat the decree of judicial separation or the order of the Court of Summary Jurisdiction as sufficient proof of the ground on which it was granted, though it should not pronounce a decree of divorce without receiving evidence from the petitioner (sect. 6 (2) and (3)). Perhaps these provisions will give rise to a body of complicated case law with respect to computation of time, but, in general, the desertion clause in conjunction with sect. 6 is likely to achieve the purpose of "reducing unseemly litigation" and "restoring due respect for the law."

3. What are generally known as the "bars to relief" in matrimonial cases may be divided into two groups, those which refer to the petitioning party's conduct as a spouse and those which refer to his or her method of proceeding before the court.

The first group has not been substantially changed by the new Act. Sect. 178 of the 1925 Act in its old form as well as in the form which it now receives by sect. 4 provides that adultery and cruelty towards the other spouse preclude a party from obtaining a divorce decree. And, in its new form, the Act provides that desertion or wilful separation from the other party without reasonable excuse disentitles a spouse to have his marriage dissolved on the ground of adultery, or cruelty by the other party. It is, however, remarkable that wilful neglect or misconduct, though it may be a bar to a petition on the ground of adultery, desertion or unsoundness of mind, can apparently not be opposed to the petitioner claiming divorce on the ground of cruelty. The significant feature of this part of

the new act is not what it does, but rather what it omits to do. It does not introduce a power of the judge to apportion the blame between the two spouses and to dissolve the marriage on the ground of the fault of both parties.

It is, obviously, the aim of the new Act to widen the discretion of the judge with respect to a refusal of a decree based on the petitioner's misconduct in connection with the case itself. Whether there is any difference of substance between "to satisfy itself" (old Act) and "to inquire" (new Act), is doubtful, it being a matter of course that in matrimonial cases the judge is always entrusted with an inquisitorial function. Apparently the danger of collusion was thought to be greater under the new Act in view of the desertion clause. But it is not likely that the way in which the courts will deal with matrimonial cases will be greatly affected by the new wording of sect. 178 (1). Unreasonable delay remains a bar to relief under the new Act as under the old.

Next to the desertion clause the most important part of the new Act from a practical point of view is the new bar to relief introduced by sect. 1. A compulsory probation period of three years since the celebration of the marriage must have elapsed before a petition for divorce can be brought, unless a judge finds on special application that it is a case of exceptional hardship or exceptional depravity. A somewhat redeeming feature is the fact that under sect. 1 (2) the judge shall have regard to the interest of any children when determining such an application and that also the question of reconciliation between the parties will have to be considered. The practical effect of sect. 1 will be somewhat alleviated by subsect. 3 which allows a petition to be based on matters which occurred during the three years. A fairly large proportion of undefended cases will be brought under the desertion clause and in such cases desertion during the first three years of the marriage will be available as a ground for divorce, though the petition can only be brought, as a rule, after the three years period is over. Whether this clause really serves the "true support of marriage" and the other purposes enumerated in the preamble is a matter now too late to discuss.

4. One of the anomalies of matrimonial law is the discrepancy which exists between the law of separation as administered by the High Court and that administered by the Courts of Summary Jurisdiction. It is at this point that a sociological inquiry into this subject would have to start. Even the new Act does not by any means remove the differences between the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, and the Judicature Act, 1925. It adds, however, by sect. 11 (1), adultery by the husband to the grounds on which a wife may get a separation order under the 1895 Act. It does not remove the difference between persistent cruelty as a ground for a separation order and cruelty as a ground for a separation decree nor any of the other differences with respect to desertion, persistent cruelty to children, etc.

While there is no longer any substantial difference between husbands' petitions and wives' petitions for divorce and separation, the law for applications to courts of Summary Jurisdiction made by husbands remains widely different from that governing applications by wives. It was only in 1902 by a Licensing Act (sect. 5) that husbands' applications for separation orders were introduced and, though the Summary Jurisdiction (Separation and Maintenance) Act, 1925, considerably increased the number of grounds on which a husband's petition could be based, the

two bodies of rules remained different. The new Act, sect. 11 (2) adds adultery by the wife to the grounds on which a husband may obtain a separation order from a Court of Summary Jurisdiction, but does not go further.

5. Some of the other clauses of the Act are of a more technical character. Sect. 9 gives the respondent against whom a decree nisi has been pronounced the possibility of applying for a decree absolute, while under the old law he or she was at the mercy of the petitioner, if he or she intended to remarry. The application for the decree absolute by the unsuccessful party can only be made three months after the moment when application by the successful party was first possible.

"Enoch Arden Cases" are dealt with by sect. 8 introducing into English law a procedure known in most systems by which a presumption of death connected with the dissolution of marriage can be decreed by the court if the other spouse was continuously absent for at least seven years and has not been heard of since.

A difficult problem of conflict of laws is dealt with by sect. 13. It is well known that according to English law a married woman's domicil is invariably that of her husband and, furthermore, that no court other than that of the domicil has jurisdiction to dissolve a marriage. One would have thought that, by analogy to the British Nationality Act, 1933, which within certain limits made the nationality of a married woman independent of that of her husband, the new Act might have altered the Common Law rule as to married women's domicil in order to remove the great hardship that a deserted wife cannot bring a divorce petition in an English Court if the husband has founded a new domicil abroad. The Act prefers to achieve this result by creating an exception to the principle that only the court of the domicil of the husband has jurisdiction to dissolve a marriage and it confines this exception to cases of desertion or deportation of aliens, not including the equally hard cases, in which the husband has disappeared after a separation in fact or a judicial separation. If in such cases the husband goes abroad and establishes a new domicil or if he leaves his English domicil of choice so that his foreign domicil of origin revives no relief is given by the Act to the wife.

In order to fulfil its promise to relieve the conscience of the clergy sect. 12 of the new Act repeals sect. 184 (3) which compelled a clergyman who refused to solemnise the marriage of a divorced person to allow another clergyman to celebrate the marriage in his church or chapel. The privilege of being entitled to refuse the celebration of marriage of divorced persons is extended to the clergymen of the Church of Wales.

Proceedings for orders with respect to alimony, settlement of the wife's property, and the application of property subject to a marriage settlement could, under the Supreme Court of Judicature (Amendment) Act, 1935, sect. 3, be commenced between decree nisi and decree absolute, though, as a rule, the order did not take effect before the decree was made absolute. The new Act, in order to remove causes of delay, allows these proceedings to be commenced at any time after the presentation of the petition, though the order shall as a rule not be made until a decree nisi has been pronounced. As hitherto it will only take effect after the decree has been made absolute. A power of the court to settle property for the benefit of the children in order to secure the payment of a gross sum or of an annuity has been added to the existing powers with regard to financial arrangements in divorce and separation cases. The law referring to alimony payable by the

husband to the wife has been extended so as to cover payment of alimony by the wife to the husband in case of the latter's insanity.

6. Eighty years have elapsed between the first and the second substantial reforms of English Matrimonial Law. Society is changing rapidly and so are the convictions and attitudes of the masses in regard to the relationship between the sexes. The new Act, though by no means fulfilling the wishes of those who wanted to see English law adapted to the most advanced systems of matrimonial law, goes a long way to remove severe hardships, caused by the existing provisions. It gives a great opportunity to the legal profession to make the best of this Act and it remains to be seen what use will be made of this opportunity.

O. KAHN-FREUND.

The Summary Procedure (Domestic Proceedings) Act, 1937

This Act is in many ways no less important than the Matrimonial Causes Act, 1937 (which is noted above), particularly in view of the extensions of the jurisdiction of courts of summary jurisdiction brought about by that Act. The Act applies to such courts when hearing domestic proceedings (i.e. cases connected with matrimony, bastardy, the guardianship of infants and similar matters). In such cases, the court shall be constituted of not more than three J.P.s and so far as possible shall contain both a man and a woman (sect. 1), but this does not apply to the City of London or the Metropolitan Police Court Area (sect. 9). So far as possible the hearing of domestic proceedings shall be separated from other business and only certain specified persons and any other person whom the court shall consider to have adequate grounds for attendance shall be permitted to be present. During the taking of evidence of an indecent character the Court may sit *in camera* (sect. 2). It is interesting to note that these powers of exclusion are wider than those enjoyed by the High Court. Sect. 3 enacts restrictions on newspaper reporting similar to those which at present apply to matrimonial causes in the High Court under the Judicial Proceedings (Regulation of Reports) Act, 1926. Sect. 4 enables a probation officer who has unsuccessfully attempted to effect a reconciliation to furnish the Court with "statements of allegations" in a form to be prescribed and containing the allegations of both parties and information as to other relevant matters. Such statements may not be used as evidence but merely for the purpose of questioning witnesses. Sect. 5 contains provisions for investigations by probation officers into the means of parties where there is power to order periodical payments of money, and sect. 6 is a valuable provision directing the Court to assist a party to examine and cross-examine witnesses where he is not legally represented and is therefore unable to do so effectively. By sect. 8 regard is to be had to religious persuasion in selecting conciliators.

These reforms should prove most valuable, especially if the various enabling provisions of the Act are extensively used.

The Trade Marks (Amendment) Act, 1937

The Trade Marks (Amendment) Act, 1937 (ch. 49), is to come into effect when the Board of Trade so directs. (1) *New Law.* Sect. 8 of the new Act provides for the registration of "registered users" who may sue in their own names, and join the registered owner, in case of infringement. The owner and proposed user apply to the registrar with particulars of their

proposed relationship and the scope or the user's "permitted uses." The Section gives a *locus standi* to sole importers and exclusive dealers where the mark is associated with the manufacturer and facilitates their protection from competition at cut prices. Under sect. 15 (3) (*a*) it appears to be now an infringement to use on goods the mark of the genuine manufacturer or dealer in circumstances where he would not wish it (overruling *Champagne Co.* v. *Buxton*, [1930] 1 Ch. 330). A written contract with the proprietor of the mark may bind all subsequent owners of goods to observe certain restrictions as to the use of the mark, unless they acquire for value without notice (sect. 17). Where a mark is registered in one class, the owner may register it in another class in which he does not propose to trade, to prevent damage to his trade in the first class by use on inferior goods in the second (sect. 13). A trade mark may be registered with joint owners if genuinely jointly used (sec. 25). The registrar may give preliminary advice as to whether a mark is *prima facie* registrable (sect. 5).

(2) *Amendments in principle of existing law.* A trade mark may be assigned or transmitted apart from goodwill, provided deception of the public is prevented by advertisement; this is retrospective. A mark may also be assigned in respect of some only of the goods in the class for which it is registered, but if the effect would be that several persons might use the mark in the United Kingdom so as to deceive or confuse, the registrar must first be satisfied that their trading areas are distinct. Application within two years after the Act may be made to register assignments or transmissions validated by it (sect. 7, overruling *Re Sinclair*, [1932] 1 Ch. 598.) An applicant for registration need not now propose to use the mark himself provided he intends to assign it to a corporation about to be constituted (sect. 11, overruling *Re Ducker*, [1928] Ch. 405). It is no longer an infringement to use a registered mark simply to describe the fact that your goods are adapted to form part of or combine with those of the owner, so long as you do not suggest that your goods are connected with him (sect. 15 (3) (*b*), overriding *Minimax* v. *Moffat* (1935), 52 R.P.C. 340; *Hoover* v. *Airway Ltd.* (1936), 53 R.P.C. 399). The law of "cotton marks" is replaced by a law for all "textile marks," and these may be registered in Manchester or London at the applicant's option, the London registrar having finally to accept (sect. 20). The Palatine jurisdiction is cut down. Application in respect of marks for "metal goods" may similarly be to London or Sheffield in all cases, and "metal goods" are more satisfactorily defined (sect. 19). "Old marks" used before 1875 must now contain essential particulars and "old marks" refused registration are no longer protected as trade marks. Not only is it an offence falsely to represent that a mark is registered but also that its registration covers particular goods or circumstances or the exclusive use of part of the mark (sect. 21).

(3) *Amendments in detail of existing law.* Trade marks registered in future will be registered for seven instead of fourteen years (sect. 10). A mark may be registered in Part B without proving two years user (sect. 3). Where a patent expires the "only practicable name or description" of the patented article may not be used by others for two years thereafter (sect. 4 (1) (*a*)). The "commonly used and accepted name" of a chemical element or compound is unregistrable (sect. 4 (3)). A mark removed for non-payment of a renewal fee may be registered for another proprietor within a year if deception or confusion is unlikely (sect. 31 of 1905 Act as amended). Sect. 44 defences (under 1905 Act) are extended

to the case of a mark registered before 1905 (sect. 28). User by the defendant before the proprietor's user but after his registration of the mark is an infringement (sect. 41 of 1905 Act as amended). Part A law is applied more widely to Part B marks (sect. 3 (2)). The Board of Trade must approve a code of regulations as to the application of a certification trade mark, and will not allow such marks to be registered or assigned unless satisfied that the applicant or assignee is competent to certify, and that the public interest is protected (sect. 18 & Sch.).

(4) *Enacted case law.* Infringement includes use of a mark on wrappers or boxes, in circulars or advertisement (sect. 15) and use in relation to the export trade (sect. 14 (1)). A mark is disentitled to protection (sect. 6) if illegal or immoral or "likely to deceive or cause confusion" ("calculated to deceive" was misleading) or if the trade no longer associates the mark with the proprietor (sect. 4 (1) (*b*)). A trade mark is compendiously defined as a mark indicating any trade connection between the goods and the owner of the mark and the mark need not indicate the actual identity of the proprietor (sect. 1).

A. K. R. Kiralfy.

NOTES OF CASES

Damages—Law Reform (Miscellaneous Provisions) Act, 1934

Rose v. *Ford*, [1937] A.C. 826. At long last the House of Lords has been given the opportunity of settling what had become to be known as " the problem in *Rose* v. *Ford*." It would involve an unwarrantable trespass on the space of this Review to describe in detail how the subjects involved in the case became a "problem." The writer of this note endeavoured to disentangle the various threads in the complicated skein of its history in the *Annual Survey of English Law*, 1935, pp. 158–162, to which he ventures to draw the attention of the curious.

The first point authoritatively settled by the House of Lords is that *Flint* v. *Lovell*, [1935] 1 K.B. 354 was correctly decided and that damages can be given to a person negligently injured by another in respect of the *objective* fact of the shortened expectation of life. "I am satisfied," said Lord Atkin "that it has always been a usual element in the assessment of damages in such cases" (p. 834). "I think he has a legal interest entitling him to complain if the integrity of his life is impaired by tortious acts, not only in regard to pain, suffering, and disability, but also in regard to the continuance of life for its normal expectancy." (Lord Wright, at p. 847.) "I regard impaired health and vitality, not merely as a cause of pain and suffering, but also as a loss of a good thing in itself. Loss of expectation of life is a form in which impaired health and vitality may express themselves as a result. In such a loss there is a loss of a temporal good, capable of evaluation in money, though the evaluation is difficult." (Lord Roche, at p. 859.)

Their Lordships admitted the difficulties involved in the assessment of damages on this head. Lord Atkin (see pp. 834–835), although he raised one or two interesting queries, preferred to leave the matter until it is properly brought before their Lordships. "It would be paradoxical if the law refused to give any compensation at all, because none would be adequate. . . . Special cases may occur, such as that of an infant, or an imbecile, or an incurable invalid, or a person involved in hopeless difficulties. The judge or jury must do the best they can, in the circumstances, in this case as in other cases." (Lord Wright, at pp. 848 and 850.) Lord Roche, who, as a member of the Court of Appeal, had very reluctantly concurred in its decision in *Flint* v. *Lovell*, now expressed his full agreement with the rule of law laid down in that case but still doubted whether it had been rightly decided on its particular facts and gave lengthy expression to his anxieties concerning the assessment of damages on this head (see pp. 859 *et seq.*). He agreed with Lord Sands' view in *Reid* v. *Lanarkshire Traction Co.*, [1934] S.C. 79, that "the matter is so hedged about with metaphysics" that in directing a jury he would be content to tell them "that the weight to be given to this element must be moderate, and that they must not consider what price the man would have put upon his life." Lord Roche commended the manner of assessment adopted by the Court of Appeal in the instant case. "It was obviously and rightly arrived at without regard to the question of the amount of future earnings, and solely on the basis of what life was going to be worth to a healthy young woman, earning her own living, with dependent parents, and with some prospects of marriage. This method seems to me to be correct. It eliminates, and rightly so, the question of rich and poor, and pays regard to the

normal and the average. A rich miser living in squalor, or a very poor man deeply sunk in misery, might require special treatment, but, ordinarily, a person may be assumed to have, or to be able to earn, enough to live his or her life, and to enjoy it. Earnings or income are otherwise, and to an extent beyond this, irrelevant." The future history of this pronouncement will be a matter of great interest.

The second, and the more important, point settled in the House of Lords was the question of the interpretation of the Law Reform (Miscellaneous Provisions) Act, 1934, sect. 1. The majority in the Court of Appeal (Slesser and Greene, L.JJ.) had taken the view that although the Act had abolished the much-qualified rule "*actio personalis moritur cum persona*," it had not abrogated the allied but different "Rule in *Baker* v. *Bolton*," that at common law no one can maintain an action against a person who by his wrongful act, neglect or default has caused the death of another. The corollary to the adoption of this view was that the Court of Appeal thought that the *Flint* v. *Lovell* damages could only be recovered by the *living* injured plaintiff, and could not be recovered at common law or under the survival provisions of the 1934 Act by the executors of the deceased injured person. The House of Lords preferred the view of the dissentient member of the Court of Appeal, Greer, L.J., that these damages did survive. Without attempting to revoke its own decision in *S.S. Amerika*, [1917] A.C. 38, the House of Lords declared that the rule of *Baker* v. *Bolton* accepted in it could have no application to the facts of this case. "There seems to me to be a substantial distinction between damages awarded to the living because life is shortened and damages to a third person because of some other person's death." (Lord Atkin, at p. 834.) "The action there contemplated [i.e., in the *Baker* v. *Bolton* rule] is clearly not an action by anyone asserting a claim in right of the deceased, but an action by a person asserting a claim in his own right to be recouped the damages occasioned to him personally by the death of the deceased. That common law doctrine is capable of alteration by statute, and the Fatal Accident Acts exemplify such an alteration. But the Act of 1934 stands on quite a different footing. It in no way affects or deals with the common law doctrine. It creates no cause of action against a person causing the death of another, for damages occasioned to the plaintiff by that death. It does not (except as regards funeral expenses) contemplate, much less does it create, any cause of action in anyone for damages resulting from death. What it does is (with certain exceptions) to preserve, notwithstanding the death of a person, all causes of action vested in that person when he died, but the claim to be asserted is a claim in right of the deceased person." (Lord Russell, at p. 839.) The right to the *Flint* v. *Lovell* damages was vested in the deceased, whose representatives appeared as plaintiffs in *Rose* v. *Ford*, before her death and, consequently, survived to her representatives under the provisions of the 1934 Act. That is the substantial point of the decision in whatever form it is expressed. As Lord Wright remarked (at p. 843). "It is . . . incorrect to say that the Act creates no new rights. Sect. 1 (5) in express terms refers to the rights conferred by this Act. The Act gives rights of survivorship where, before the Act, there was no such right. It gives a new right, because it prevents a right from being extinguished. It is, however, true that the personal representative has no right but that which the deceased, if alive, could have enforced." It was Lord Wright who also made the comment (at p. 846): "The view of the Court of Appeal illustrates a tendency common

in construing an Act which changes the law, that is, to minimise or neutralise its operation, by introducing notions taken from, or inspired by, the old law which the words of the Act were intended to abrogate, and did abrogate. A similar tendency is illustrated, I think, by the references to a dogma, of somewhat obscure import and uncertain application, that, in a civil court, the death of a human being cannot be complained of as an injury. For reasons already stated, that is not what is complained of here by the administrator, any more than it would, or could, have been complained of by the girl, if alive at the date of the trial."

As their Lordships agreed that the Act had not abolished the rule in *Baker* v. *Bolton* (as Lord Roche remarked, it has expressly affirmed it with exclusion from its operation of claims for funeral expenses), but merely held that it was irrelevant in this case, it may be of interest to note the *obiter dicta* made on the alleged basis of that rule. "I will only say that, if the rule is really based on the relevant death being due to felony, it should long ago have been relegated to a museum, for deaths by negligence are often not felonious, and, where they happen more than a year and a day after the wrongful act, cannot be." (Lord Atkin, at p. 834.) "In any event," said Lord Wright (at p. 846), "whatever the old law may have been, the modern law is quite clear that, if the act complained of constitutes a felony, the civil remedy is not drowned but merely suspended. But, however limited, the rule that the plaintiff must first prosecute in a case of felony is an anachronism, now that the police prosecute, or are assumed to prosecute, in every case of probable felony. Nor do I see how it can ever be alleged, in any case where a person has been killed by negligence in driving a motor-car, or by any other negligence, that the act is felonious, unless and until the jury have so decided. No pleader would, I imagine, go out of his way to allege felonious negligence." Lord Roche went still further; after dwelling on the irrelevancy of the *Baker* v. *Bolton* rule to the present case, he added (at p. 857), "This does not mean that I am not acutely sensible of an apparent contradiction, or inconsistency of principle, between that rule of law and the existence of the right to the damages now in question; but on a consideration of the matter, I am unable to see that it is the duty or the right of your Lordships, sitting in a judicial capacity, either to enter upon a task of rendering the law uniform and consistent, where lack of uniformity or of consistency may manifest itself at present, or, for the sake of uniformity, to extend the rule to cases and circumstances not actually within its scope." We have quoted these remarks at length because they suggest that the time is ripe for the reconsideration by reformers of the rules in *Baker* v. *Bolton* and in *Smith* v. *Selwyn*, [1914] 3 K.B. 98. The application of the latter rule is excluded under the Fatal Accidents Acts and there appears to be no adequate reason why the exclusion of it should not be extended further.

One other matter was discussed by their Lordships and that was the possibility of duplication of damages under the Act of 1934 and the Fatal Accidents Acts. The view expressed by Lord Atkin (at p. 835) was, "If those who benefit under the last-mentioned Acts also benefit under the will or intestacy of the deceased personally, their damages under those Acts will be affected. If they do not, there seems no reason why an increase to the deceased's estate in which they take no share should affect the measure of damages to which they are entitled under the Act." "One of the fruits of continued life," added Lord Wright (at p. 853), "is, generally, provision for dependants. If that provision is made good by awards under

the Fatal Accidents Acts, the loss consequent on the shortening of life may be deemed to be *pro tanto* reduced."

D. R. Seaborne Davies.

Manslaughter—Negligent Driving

Andrews v. *Director of Public Prosecutions*, [1937] A.C. 576. It may be a little unfortunate that, owing to the pressure on the space, a detailed note on the judgment of the House of Lords in this case had to be omitted from an earlier issue of this journal. The Criminal Statistics indicate only too clearly how the question of road offences, and, particularly, of homicide on the highway, has become a major social question. It is now a little late in the day to include the lengthy note which was originally prepared on the subject, particularly after the appearance of Mr. Patrick Dean's article in the *Law Quarterly Review*, Vol. 53, p. 380, with the general conclusions of which we heartily agree.

When Mr. R. S. Wright, as he then was, drafted the Jamaican Criminal Code in 1877, he remarked in the accompanying "Explanatory Memorandum" how singularly fragmentary and unsystematic the English Law of criminal harm is and always has been. He referred to the fact that the earliest conviction for causing death by a negligent omission does not date back further than 1776 and that "the common law has been only partially and unsystematically made good by statutes dealing with particular kinds or means of harm." He proposed in sects. 98–100 to fill in the gaps in the law by the creation of three classes of offences which he called "negligent harm," "negligent grievous harm," and "negligence by persons in charge of dangerous things." But his proposals were designed for Jamaica and not for England. When the development of the internal combustion engine brought with it the problem of the delinquent motorist, the apparatus of English Law for dealing with it was confined to the old felony of manslaughter and some provisions of old Highway Acts singularly ill-adapted to meet modern conditions. The mischief was all the greater because of the looseness of the definition of manslaughter, and, particularly, of the ingredient of negligence in it. Fitzjames Stephen had to admit that "What amount of negligence can be called culpable is a question of degree for the jury, depending on the circumstances of each particular case." R. S. Wright contented himself with saying, "With respect to negligence, the only question appears to be whether some attempt should be made to discriminate between different degrees of negligence. No satisfactory criterion for this purpose has ever been suggested, except that which is involved in the terms of sect. 11 [of his code], namely, that where the law does not prescribe the precautions to be used, the care must bear some proportion to the risk." That suggestion could not carry the law very far. In fact, it did not go far enough to cover the insistence of English Law that criminal, as contrasted with civil, negligence must be "gross" or "culpable." What is sufficient to amount to such negligence has never been satisfactorily defined by the Courts. Lord Hewart in 1926 attempted to describe it by stating that in order to constitute manslaughter the negligence must go "beyond a mere matter of compensation between subjects" and show "such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment"—which is on a par with the definition of an archdeacon as one who discharges archidiaconal functions. Mr. J. W. C. Turner, in his very exhaustive

article in the *Cambridge Law Journal* (1933), Vol. V., p. 61, on "*Mens Rea* and the Motorist," very appositely pointed out that it is not the function, nor within the capacity, of a jury to decide what goes beyond a matter of compensation or what amounts to a crime against the State, and that if a jury thinks that the negligence of the accused showed a disregard for the life of others its finding to that effect should amount to a verdict of guilty of murder.

Even before the creation of the modern road traffic offences, English Law was involved in the difficulties that many cases dealt with as manslaughters were technically murders in strict theory of law and that the law of manslaughter which was invoked to avoid the dislike of capital verdicts was itself in this undefined state. When the modern carnage on the roads became serious, the further complication arose that juries were loath to convict "nice" people of manslaughter. To meet the multiplicity of non-fatal offences and, perhaps, to provide a minor offence of which motorists could be convicted without unduly straining the susceptibilities of juries, the Road Traffic Act, 1930, created two new offences, "reckless driving" (sect. 11) and "driving without due care and attention" (sect. 12). This device undoubtedly did equip the law with a better arsenal of weapons to meet the road gangsters and hogsters, but it was bound inevitably to raise legal questions of a most difficult character. If sect. 11 speaks of a person "who drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public," and if the offence is committed with fatal results, how can the *mens rea* of an offender under sect. 11 be distinguished from the *mens rea* required for manslaughter? If a motorist is charged with having committed both offences by the same course of conduct, must he be either acquitted or convicted on *both* counts? That was the question which the Court of Criminal Appeal was asked to decide in *R.* v. *Stringer*, [1933] 1 K.B. 704, and which it answered in the negative by a most unilluminating reference to the irrelevant topic of *autrefois convict* or *acquit*. The adoption of the view that the *mens rea* required for sect. 11 is different from that which is required for manslaughter, leads inevitably to the further question of what can the difference be between the appropriate *mentes reae* of sects. 11 and 12. If the "recklessness" of sect. 11 does not mean "realising the possibility of harm to others," which is the *mens rea* commonly attributed to a person guilty of manslaughter, what can the lack of "due care and attention" mean in sect. 12?

This is the knot which the House of Lords has completely failed to untie in *Andrews' Case*. In our humble submission, the judgment of Lord Atkin, although it shows a greater awareness of the elements of the problem, marks very little advance on that of Lord Hewart in *R.* v. *Stringer*. Neither in exposition nor in illustration is it convincing. To say that the law declares that the cogs of its machinery must fit together, does not mean that they will if their shapes prevent them doing so. To direct trial Judges to run the machinery without telling them how to do so is equally unhelpful. Appeals to public policy are poor correctives of unscientific draughtsmanship. The position at the moment is that the law, in effect, tells the layman of the jury to do as he thinks fit according to his view of the seriousness of the case. The more precise a direction from the Bench will attempt to be, the more uncertain and baffling will it become—and the more likely is it that a resulting conviction will be upset on appeal.

We could embark on the admittedly delicate task of suggesting what the shapes of the cogs in the legal machinery should be, but that would involve trespassing on ground already excellently covered by Messrs. Turner and Dean. Our view is that these problems cannot be solved unless the Law Revision Committee, or some other persons or body of persons charged with the task of reform, embark on an overhaul of the law of homicide first and then fit in these minor offences. It was not in 1937 but in 1874 that a Select Committee "earnestly recommended" that "the attention of the Government and of Parliament should be directed to the present imperfect state of the definition of the Law of Murder. . . . If there is any case in which the law should speak plainly, without sophism or evasion, it is where life is at stake; and it is on this very occasion that the law is most evasive and most sophistical." In the intervening sixty years, little has been done to remove the "sophisms and the evasions"; for every removal there has been a substitution. The 1874 reformers, when they mentioned "life at stake," were thinking of convicted prisoners; the reformers of 1937 must have on their consciences the lives of thousands of road-users very much "at stake" on our highways.

D. R. Seaborne Davies.

Solicitor and Client: Insurance Claim

Groom v. *Crocker and others*, [1937] 3 All. E.R. 844, is a case which gave rise to several interesting points. In the first place a dispute took place over the reporting of it in the newspapers which led to the suspension of a reporter and a sort of strike among his colleagues. This must be unique in the history of reporting. Again from the point of view of the law of libel it is interesting to notice that the jury considered that it is defamatory of a man to say that he has driven a motor-car negligently, and the judge agreed with them—in his view it brings a man into contempt. But why stop at negligently driving a car? Is it defamatory to accuse a man of any kind of negligence? or indeed of any sort of tort? Before we know where we are it will be libellous to write a letter to a man claiming damages from him for tort.

The substantial point of the decision, however, has regard to the duty of a solicitor employed by one person to act on behalf of another towards that other. The business of modern insurance against third party risks has brought it about that the insurance companies claim, not unnaturally, to be *dominus litium* as regards any proceedings brought against their assured. They accordingly appoint their own solicitors to act on behalf of the assured and these solicitors assume full control of the proceedings. Are they entitled entirely to disregard the interests of their titular "clients"? In the instant case the plaintiff was insured in respect of a motor vehicle under the terms of a policy which gave to the insurer "absolute conduct and control of any proceedings" against him covered by the terms of the policy in question. He became involved in a collision as a result of which a passenger with him in his car was seriously injured, and brought an action against the owners of the other vehicle. The defendants of those proceedings suggested that the present plaintiff should be joined with them as co-defendant, and although the plaintiff passenger did not seriously contend that there had been negligence on the part of the present plaintiff he agreed to this course. The matter was then in the hands of two insurance companies; for each vehicle was insured.

As is usually the case on these occasions there was a standing agreement between the two insurance companies, usually called a knock-for-knock agreement, under which they had undertaken to settle such cases between themselves. The legal advisers of the insurance companies then arranged, for the convenience of their clients, that the liability for the accident should be placed upon the present plaintiff, and the defendant who had been appointed to act as his solicitor by his insurers delivered a defence admitting his liability as solely to blame for the accident, and in spite of his protests persisted in that attitude at the trial of the action when substantial damages were awarded against him.

The plaintiff had an obvious grievance against both his insurers and his titular solicitor, and brought these proceedings. The insurers succeeded with a defence based on the presence of a *Scott* v. *Avery* clause in the policy. The solicitor, however, was found guilty of a breach of duty in that he had been negligent of the interests of one who was legally his client. The question of measurement of damages gave rise to some difficulty, but it was held that there was some possibility of actual damage in that the plaintiff might find it more difficult to effect insurances in future, and the matter being left to the jury they awarded £1000.

R. S. T. Chorley.

Adoption of Children

The decision of Luxmoore, J., in *Re C., An Infant*, [1937] 3 All. E.R. 781, is particularly interesting because of the reference made in the judgment to the parliamentary debates upon sect. 2 (1) of the Adoption of Children Act, 1926. This section prohibits the adoption of a child when the proposed adopter is less than 21 years older than the child, but it contains a proviso that, even in such a case, the Court may make an adoption order where the applicant, and the infant, "are within the prohibited degrees of consanguinity." In this case the mother of an illegitimate child and the mother's husband made a joint application for an adoption order. Both the mother and her husband were less than 21 years older than the child. Luxmoore, J., held that an order could only be made in favour of the mother, since she alone was consanguinous with the child: the words "prohibited degrees" in the section are not limited to cases where the parties concerned are of the opposite sex. His Lordship animadverted (at p. 785), upon the previous chamber practice whereby orders had been made in favour of the husband.

B. A. Wortley.

Divorce—Collusion

The short point of *Wyatt* v. *Wyatt*, [1937] 3 All. E.R. 885, is that discussions about divorce which occur before a voluntary separation are not necessarily evidence of collusion when later a spouse decides to petition for divorce. The circumstances are fully discussed in the judgment of the President.

B. A. Wortley.

Income Tax

Reed v. *Cattermole*, [1937] 1 K.B. 613, appears at first blush to have only a technical interest; the point at issue was, whether a Methodist minister living rent free in a manse provided by the Circuit, occupied it

for the purpose of performing his duty to the church or whether his occupation was by way of payment for his services. If the latter was the case, then the rates and property tax in respect of the manse, which had been paid by the church, was a payment on his behalf and assessable to income tax as part of the emoluments of his office (*Miller* v. *Inland Revenue*, [1930] A.C. 222, *Nicoll* v. *Austin* (1935), 19 T.C. 531, etc.) in the former event, since his occupation would be that of a servant, these payments would not be made on his behalf and would therefore not be assessable upon him (*Tennant* v. *Smith*, [1892] A.C. 150). In the event, the Court of Appeal held that the occupation was analogous to that of a servant and was not by way of payment of wages (*Hughes* v. *Overseers of Chatham*, 5 Man. & G. 54) so that the sums paid by the church trustees were not the income of the minister.

The case is of somewhat wider interest as throwing a sidelight on the basis of taxation of persons in receipt of remuneration; under Schedule E of the Income Tax Act, 1918, a person is assessable in respect of the "salaries, fees, wages, *perquisites or profits whatever therefrom . . .*" arising from exercising an office or employment of profit. The meaning of the words in italics has many times been disputed before the Courts and can perhaps best be defined in the words of Lord Atkin in the most recent case on the topic (*Weight* v. *Salmon*, [1935] 51 T.L.R. 333) as "anything in the nature of money's worth." The Courts have held that Easter offerings, footballers' benefits, income tax paid on behalf of an employee, the right to subscribe for shares at a price considerably below their market value, payment of the cost of running a managing director's establishment, etc., etc., are all profits assessable to income tax; on the other hand, payments as in *Reed* v. *Cattermole*, gifts unconnected with one's employment, cricketers' benefits and payments made after an employment has ceased do not fall within the charging section. To be assessable the payment must be in the nature of money's worth *and* not of a purely personal character unconnected with the employment.

It is interesting to compare the treatment of similar payments for the purposes of Federal Income Tax in the United States; by sect. 22 (*a*) Revenue Act, 1936, "income from salaries, wages or compensation for personal services of whatever kind and *in whatever form paid . . .*" is taxable. By Arts. 22*a* (2–3) of Regulations 94 applicable to the above Act, all sums paid to clergymen (analogous to our Easter offerings and marriage fees) are taxable, while as regards "compensation paid other than in cash," the fair market value of the thing taken is the amount assessable and includes the value of living quarters where provided as a reward for services rendered.

In the case of clergymen of the Church of England and Established Church of Scotland, whose vicarages and manses are in the nature of a freehold, the annual value of the property forms part of the clergyman's income for the purposes of British Income Tax (*Corke* v. *Fry*, 32 Sc.L.R. 341); in America, however, the rental value of a dwelling-house supplied to a minister as part of his remuneration is statutorily exempted from taxation (sect. 22 (*b*, 6), Revenue Act, 1936).

Under the well-known Schedule D of the Income Tax Act, 1918, tax is exigible from any person "carrying on a trade"; the exact meaning of this term has often been agitated before the Courts who have tended, of recent years, to regard it as a question of fact upon which the decision of the

Appeal Commissioners is final provided that there was *some* evidence to enable them to arrive at their finding. In *Baker* (*Liquidator of First National Pathé Ltd.*) v. *Cook*, [1937] 3 All. E.R. 468, the liquidator of a film company sold its plant, stock, etc., to two other like companies but retained the benefit of contracts for exhibiting films on hand at the liquidation. The new companies carried out these contracts, paying the proceeds to the liquidator who contended he was not assessable thereon as he was not carrying on a trade. The question was whether this was the ingathering of the assets of the company and as a capital receipt not taxable, or the carrying on of a business in order to enable the assets to be realised to the best advantage (see *Hillerns & Fowler* v. *Murray* (1932), 48 T.L.R. 213, as to trading after the dissolution of a partnership). Finlay, J., had no doubt that a trade was being carried on by the liquidator, who was entitled so to do (*vide* sects. 191, 228, 248 Companies Act, 1929, which taken together make it clear that a liquidator can carry on business so far as is necessary to the winding up).

A. F.

Loss of Expectation of Life—Assessment of Damages

Roach v. *Yates*, [1937] 3 All. E.R., 442, and *Turbyfield* v. *G.W. Railway Co.*, *The Times*, 4th December, 1937, illustrate the difficulties which the Courts are experiencing in assessing the damages for the loss of expectation of life (see the note on *Rose* v. *Ford*, *supra*). In the former case, the plaintiff had been reduced from a healthy young bricklayer to "very nearly a hopeless lunatic," requiring day and night nursing, owing to the brain injuries inflicted on him through the negligence of the defendant. The Court of Appeal awarded him damages under the following heads: (1) The actual loss and expenditure he had incurred as a direct result of the accident; (2) (*a*) the loss of wages during the remainder of his life, (*b*) the expenses to which, in his present condition, he must inevitably be put in order that his life should be maintained; (3) the pain and suffering, the shock, the misery, and the loss of expectation of life resulting from the injuries. The Court could find no objection, in assessing the damages under head (2) (*a*), to taking an actuarial estimate of his normal expectation of life (not his expectation after the accident had taken place), capitalising the income which he would have earned during that period (without reckoning any increase of wages which he might have gained, as no evidence had been given on that head), and then making a reasonable deduction for the contingencies of every kind which are incidental to normal life. Under head (2) (*b*), the Court awarded him a capital sum approximating to £3 per week for the expected remainder of his life as a form of compensation for the loss of wages incurred by his wife and sister-in-law surrendering their posts in order to devote themselves to nursing him. Greer, L.J., thought that the Court was not entitled to consider the possibility of his being thrown upon the mercy of some charitable organisation, as no suggestion of the kind had been made in the case. On head (3) Hilbery, J., was held to have erred in the Court below in taking into consideration the fact that, owing to the accident, the plaintiff would probably welcome the release of death. It was not open to the defendant to plead in mitigation of the *Flint* v. *Lovell* damages that he had reduced the attractive qualities of the plaintiff's life by the very act of which the plaintiff complained.

In the second case, which we can only note very briefly, Greaves-Lord, J., expressly invited an appeal from his judgment, in which he tried to assess the damages payable to an administrator of the estate of an eight-year old child under the Law Reform Act, 1934, in respect of her loss of expectation of life. He refused to rest himself too squarely on the Registrar-General's tables of the normal span of life and thought that the exigencies of infant life should be taken into consideration. But he made allowance for the fact that the child might have become capable of earning her own living and of having prospects of marriage—"the fulfilment of the natural expectation of life." He awarded £1,500 damages.

D. R. Seaborne Davies.

REVIEWS

DAS RECHT DES WARENVERKAUFS:—Vol. I. By Ernst Rabel. (1936.) Berlin, Walter de gruyter & Co. R.M. 25. Large 8vo. pp. xxxii and 533.

Comparative lawyers in all countries will extend a hearty welcome to the first volume of Professor Rabel's treatise on the law of sale of goods. No higher praise can be given to it than to say that it corresponds in point of comprehensiveness and accuracy to what one would expect from the high reputation which the learned author so deservedly enjoys.

The book begins with a general survey of the various systems of law of sale of goods, and then goes on to deal in detail with the formation of the Contract of Sale—a topic the importance of which extends far beyond the limits of this particular branch of the law. A discussion of the rights and duties of the seller completes the volume. The second volume, not yet published, will deal with the rights and duties of the buyer and with what an English lawyer would term implied conditions and warranties. The most important sections of the first volume are those which relate to three matters, namely, the formation of the contract, its frustration by supervening impossibility, and the measure of damages. These embody what is perhaps the most important contribution yet made to the comparative study of the law of Obligations.

As the author acknowledges, it was Professor Lambert of Lyon who first directed the attention of comparative lawyers to the fertile field which lay open to their investigations in what he very aptly termed "mobile law." By this he meant those rules which are constantly in operation and are called upon to solve the same problems in all countries. They are essentially dynamic and constitute one of the main sources of the conflicts of law which it is one of the tasks of the comparative lawyer to dispel. In particular Professor Lambert referred to the law of sale of goods as being a topic of this nature, and he had not long to wait before his ideas were translated into action. The large measure of success which in 1930 and 1931 attended the efforts of the Economic Section of the League of Nations to secure the unification of the law of negotiable instruments led to the belief that a like result might, perhaps, be arrived at in the case of the law of sale. The task of investigating the matter and of framing proposals for unification was accordingly entrusted by the League to the Institute for the Unification of Private Law at Rome, which in its turn confided it to a Committee of experts representing the principal European systems of law. After three years of research and discussion this Committee drafted a Uniform Law of Sale which is at the moment under consideration by the League and the various governments which have been consulted. Professor Rabel was the "live wire" of the Rome Committee and most of the spade work which preceded the work of drafting was done under his supervision at the Institut für ausländisches Privatrecht in Berlin. The results of these preliminary studies have formed the basis of the work now under review.

Two observations of a general character must be made. In the first place the book is prima facie one for the specialist rather than for the general reader, but it will beyond doubt appeal to a wider circle than that

of experts in mercantile law because nowhere else will one find so careful and exhaustive a study of the comparative aspects of some of the most important rules of the law of contracts. Secondly, a perusal of its pages leads to the conclusion that in a case of this kind economic and legal considerations are so intermingled that the process of unification is bound to be both lengthy and arduous. It took rather more than half a century to secure partial unification of the law of bills of exchange, though this was a case of reconciling differences of law rather than divergences in business practice. But the law of sale of goods is more particularistic in character. So much depends on whether a country is a manufacturing country or not and on the way in which its goods have to be brought to market. A struggle is everywhere in progress between buyers and sellers to secure the adaptation of the law to their respective requirements, and the remedies for breach of the contract of sale are not the same in all jurisdictions. These, among other considerations, render compromise difficult and have led to the regulation of the bulk trades by the provisions of standard forms of agreement rather than by rules of law. This must be borne in mind when a book such as this is consulted because the background against which its conclusions are stated may be such as to deprive some of them of much of their practical importance.

Professor Rabel's work is, in the first place, a storehouse of information as to the various national laws which deal with the sale of goods. He has given us an invaluable guide to the many questions which must be faced if unification is to be regarded as more than a dream and has supplied the materials for any future attempts to secure uniformity. But the book is more than this because it embodies the most complete and successful effort hitherto made to construct a synthesis from the yield of the process of comparison. Very little has escaped the learned author's attention and an incredible amount of work must have been put into the book.

It is very difficult to criticise an encyclopaedic work of this nature in detail. The systems of law with which it deals are so numerous that no one reviewer could venture to undertake the whole of the task. So far as statements of English law are concerned we have found very little to quarrel with. Here and there one notes omissions, e.g. when discussing the effect of a strike in relation to frustration there is no reference to the case of *The Penelope* [1928], P. 180. The author's treatment of the consequences of supervening impossibility and frustration in English law follows the lines adopted in Pollock and Anson's works on Contract and suggests that he has found our rules to be rather a tough morsel to swallow. There is also a tendency on his part to deal simultaneously with English and American rules, which is fraught with a certain amount of danger. One also notes here and there a certain over-elaboration of detail and an undue compression of argument which makes the text somewhat difficult to follow. But these, after all, are minor criticisms and do not detract from the merits of the book. It is not always possible to accept the conclusions arrived at by the learned author but differences on matters of opinion are inevitable in such complicated questions as those which are dealt with. The work is one which must be regarded as of the very highest scientific value and as an indispensable instrument in the work of bringing closer to one another not only the technical rules of the law of sale but also the rules of the law of obligations in general.

H. C. GUTTERIDGE.

MODERN EQUITY. By H. G. Hanbury, D.C.L., M.A. 2nd Edition. 1937. London: Stevens & Sons Ltd. Pp. l and 814. **£1 10s.**

Whether Equity should be retained as a separate subject of study is a question much debated by all interested in legal education. Dr. Hanbury, although he admits that it cannot now be thought of as entirely divorced from law, believes that it should, and this book is a brilliant attempt to justify this opinion. In our view it fails but fails not through any fault of the learned author but simply because his thesis is untenable at the present day. When reading the book we are always intrigued by Dr. Hanbury's grasp of legal principles and lulled by his admirable literary style (except on the rare occasions when we are irritated by the frequency of his classical allusions and similes, some of which do not appear to us to be particularly apt), nevertheless, we are left with a slight feeling of dissatisfaction as if we were being allowed to see only half the picture. The text constantly touches upon branches of Land Law, the Law of Contract and the Law of Tort, but it is only the equitable doctrines that are expounded. Years ago these doctrines were doubtless a fit subject of study in themselves but statutes such as the Judicature Acts and, in particular, the property legislation of 1925 have, it is submitted, altered this. Even Dr. Hanbury has been unable to disguise the fact that a book on Equity is largely a collection of rules on various topics—Trusts, Mortgages, Administration of Assets, Specific Performance, Injunctions, Cancellation and Rectification, etc.—the connection between which is not logical but merely historical. It is submitted that each of these topics should either be treated as a separate head of legal study or as a branch of a larger whole of which it logically forms part. For example, history may demand that Specific Performance should form part of a book on Equity, but logic and convenience surely require that it should be dealt with in a book on the Law of Contract.

These remarks, however, are perhaps out of place in a review of a Second Edition. All that such a review need do is to indicate how far the book has been satisfactorily brought up to date and to what extent the former edition has been improved upon. As regards the first point, the new edition contains about 50 new cases of which *Rose* v. *Ford* is accorded particularly detailed treatment. Unfortunately the book was published before the decision of the House of Lords in this case, a note on which appears in another section of this journal. The Law Reform (Married Women and Joint Tortfeasors) Act, 1935, is also considered and the recommendations of the Law Revision Committee on the working of the Statutes of Limitation form the subject of an appendix. There are, however, some surprising omissions, notably *Shears* v. *Wells*, [1936] 1 All E.R. 832, *Fisherden* v. *Higgs & Hill*, 153 L.T. 128, in the light of which the statements at p. 558 require qualification, and *Re Keen's Estate*, [1937] 1 Ch. 236 (which was available in the Reports long before June, 1937, the date of Dr. Hanbury's preface) although as regards the last case it should be mentioned that Dr. Hanbury's views of the law are the same as those there adopted by the Court of Appeal.

As regards improvements on the former edition, this contained very few inaccuracies and many of these have now been corrected. Nevertheless, there are still a number of places where Dr. Hanbury makes dogmatic statements which the cases hardly support. Thus, at p. 43, the difficult case of *Purchase* v. *Lichfield Brewery*, [1915] 1 K.B. 184 is cited as an

authority for the proposition that the doctrine of *Walsh* v. *Lonsdale* only applies where the "tenant" has entered into possession. It seems clear that, provided specific performance can be granted, entry into possession is not required and *Purchase* v. *Lichfield Brewery* is merely an example of circumstances in which the Court will not grant specific performance, a question on which *Swain* v. *Ayres*, 21 Q.B.D. 289, might well have been cited. At p. 242 Dr. Hanbury apparently states that it is only necessary to make apportionments as between capital and income under the corollary to the rule in *Howe* v. *Lord Dartmouth* when the unauthorised investments are not sold within the executor's year. In fact it seems clear that such apportionments are necessary in every case to which the rule applies and even although the investments are sold within a year from the testator's death. At p. 485 it is suggested that the recent case of *Re Thompson*, [1936] Ch. 676 is inconsistent with *Re Worthington*, [1933] Ch. 770. But it is submitted that the cases are clearly reconcilable; Part II of the First Schedule to the Administration of Estates Act, 1925, applies to both legacies and debts so that legacies are payable out of a lapsed share of residue before an unlapsed share (*Re Worthington*), but the personalty of that lapsed share will be utilised before the realty (*Re Thompson*). At. p. 487 Dr. Hanbury can hardly be blamed for not foreseeing the decision of Bennett, J., in *Re Duce & Boots Contract*, [1937] 1 Ch. 642; at the same time, he was over-bold in begging the question by stating that s. 36 (7) of the Administration of Estates Act, 1925, enacts that an assent is *conclusive* evidence that the beneficiary in whose favour it is given is the person entitled to the legal estate. In fact the subsection merely states that the assent is *sufficient* evidence and Bennett, J., has now held that this means something very different.

Apart from these minor points, it is suggested that certain parts of the book might be further improved. For example, the treatment of restrictive covenants at pp. 34–42 might certainly be better, while the discussion of the doctrine of consolidation of mortgages (which students always find difficult) is far from clear. Dr. Hanbury's views on the juristic nature of equitable interests are famous but in the chapter on this subject he fails the consider the effect of the Land Charges Act, 1925, although his observations on p. 53 makes it clear that he is fully alive to the implications of the provisions of this statute. While the learned author's section on the priority of mortgages is particularly good so far as the pre-1926 law is concerned, the treatment of the new law might be clearer.

The general opinion of this book is clearly shown by the fact that the First Edition was exhausted in only two years, and the criticisms and suggestions expressed above must not be thought to indicate disagreement with this view. This book is almost certainly the best students' text-book on the subject that has yet appeared. If we have ventured to suggest that it is regrettable that it should be necessary for such a book to be written, this is a criticism of our system of legal education and not of Dr. Hanbury. Our only quarrel with the latter is that owing to the excellence of his efforts, there will doubtless be an even greater reluctance than formerly to alter the system in the way that we should like. From this point of view we regard this book as the most regrettable thing that has happened since Maitland enabled the present system to be preserved by publishing the first satisfactory students' book on the subject, and at least Maitland expressed views similar to ours—Dr. Hanbury denies us even this consolation!

L. C. B. Gower.

INTERNATIONAL LEGISLATION. By TORSTEN GIHL. Oxford University Press. 1937. Pp. 158. Price **10s. 6d.**

In recent years legal philosophy has seen the emergence of a new positivism. Fashions in thought are not undetermined by a social context, and the revival of the positivist method is probably the result of uneasy social conditions on the one hand, and increasingly intricate private economic interests on the other. In order to preserve the economic and political *status quo* and protect the highly ramified structure of vested interests many of our lawyers and philosophers have withdrawn themselves into an ascetic positivism into which no problem of an ideal of general social well-being is allowed to intrude. (Even those who most strenuously advocate recognition of the necessity for such an ideal are unwilling to permit it to trespass on the hallowed ground of contract and property rights. Dean Pound has always been careful to confine his liberalism within these limits.) There has been a gradual drift away from the theory that man can make and change his law so that it conforms to a metaphysic, and even a confirmed idealist like Stammler does homage to positive law. A philosophy of law which sets itself the task of eradicating all traces of idealism sentences itself if not to aims which cannot be realised, then at least to conclusions which are worthless. It is no rare phenomenon to find Positivist A accusing Positivist B of "crypto-idealism." How often does the student of Duguit wonder when and how the positive postulate of social solidarity becomes a principle of ethical necessity. One should not complain too strenuously of this, for the practical value of a positivist theory of law is in inverse ratio to the success with which the author retains his unrelieved positivism.

The field of Public International Law offers obvious opportunities to the theoretician and rationaliser. It is not surprising, therefore, to find current modes of thoughts reflected in this branch of study. Mr. Gihl has undertaken the labour of sweeping from the Augean stables of International Law all traces of idealism and naturalism. In an essay dealing with the changes in law and legal situations he seeks to redefine law in terms of the most austere positivism.

He deplores the misconceived efforts of those positivists who base the binding force of International Law on the will of States. Triepel's theory is mystical and unreal; rules which emanate from a will cannot bind that will. The attempt to find the basis of International Law in a prejuridical norm, whether it is said to be the result of historical and sociological processes (Anzilloti) or a subjective theory of knowledge (Kelsen), is equally objectionable, particularly if that norm is *pacta sunt servanda* which provides not a basis for International Law but a mere tautology. The author thinks all investigation of this problem is superfluous. By law is meant *was als Recht funktioniert* and for the positivist no further inquiry is necessary. (He is unaware of any tautology in his own treatment of law. Inept definition of this kind is inescapable for the positivist since he almost invariably makes initial postulates of his conclusions.) The *de facto* reasons for observance of law are a myriad of needs and interests, and all of these are of a non-metaphysical nature. Few will quarrel with the first part of this statement, but those of us who question the second must rest content with the *ipse dixit* of the author. This, he says, is equally true of municipal law, so that the absence of a super-national tribunal, which provokes doubt as to the legal nature of International Law, need no longer perplex

us. It merely indicates that the legal persons and not their organs must enact and maintain the law. International Law, therefore, is essentially customary. *Pacta sunt servanda* is a customary rule—a purely positive rule without any metaphysical or ethical significance. Only customary rules correspond to the "laws" of a municipal State and these are the only supernational rules binding on new States without their consent. ("Will" is a convenient fiction covering the complex of forces which ensure the observance of law.) The term international legislation applies to customs and changes in customs, but never to treaties. They are merely contracts binding on the parties to them; the very fact that it is found necessary to incorporate a rule in a treaty shows that it is not otherwise considered binding. As long as a rule is not applied in practice independently of treaties it cannot be considered a rule of International Law. The author urges this argument to the length that a principle does not become one of International Law even though it is established by a treaty to which all States are signatories. On the other hand if a single State does not sign but yet applies the rule it becomes part of International Law. It will surely embarrass most lawyers to be told that the principles of the Declaration of Paris before the United States enforced them were not part of International Law.

Mr. Gihl holds that the origin and validity of law in the municipal sphere assist us to an understanding of law in the international order. These problems, however, are historical and never metaphysical. He points out that at various stages in the development of municipal law there were features characteristic of International Law too. So exact is the similarity at times, that he deduces that these are identities rather than analogies, the State taking the place of the *gens*. Moreover, there is often a correspondence even in chronological order. But the reader must not assume that there are any general principles of law; to allow these to creep in would mar the completeness of the author's positivism. "The connexion is simply that similar conditions brought with them similar methods of procuring justice. . . ." Here and elsewhere the author approaches perilously near to the adoption of a naturalist doctrine, only to apply the brake at the last moment. Thus, in discussing the formation of custom, "we may say that the transition from usage to custom takes place where a certain mode of action is regarded as the expression of a rule of law, and according to this we might perhaps say that it is juridical consciousness (a *conscience juridique*) that transforms usage into a custom." (There is, of course, the usual circularity of definition here.) This *conscience juridique* he hastens to assure us is an abstraction—a conveniently compendious form by which to designate the complex of factors which contribute to the origin and continuance of law. The main factor has probably been the forcible insistence on interests, from which were evolved first "rights" and then "duties". States are thus forced against their wills to act according to the Kantian imperative. Expediency has also been an important factor, but this must not be taken to imply that solidarity, justice or necessity have been constituent or formative principles.

The second part of the essay deals with changes in legal situations. The network of inter-State relations changes so rapidly that customary law cannot adapt itself with sufficient rapidity. The result is often a tension between law and the situations it governs. Often recognition of the new situation will not require a change in the law, although it may

require a relaxation or modified application of the law. Thus, if a State finds itself cramped for territory because of a swelling population it will not question the rule that each State has an exclusive right to deal with immigration, but it may press for a particular State to suspend its immigration restrictions. What is needed is not machinery for altering the rules of law, but power to redress individual hardships *contra legem*. The author examines the present possible methods for procuring recognition of changes of this kind, but reaches the melancholy conclusion that all are inadequate or defective. The only satisfactory assurance of perpetual peace would be a super-State authority. Until one emerges changes will continue to be effected by war.

J. GOLD.

KENNEDY'S LAW OF CIVIL SALVAGE. Third Edition by His Honour Judge A. R. KENNEDY, K.C. London: Stevens & Sons, Limited. 1936. **15s.** net.

This well-known handbook on the law of Civil Salvage has now been published in the third edition. It represents a complete guide through the numerous legal questions arising from salvage. However, the learned editor, following tradition, goes beyond that pale. He also explains the historical foundations of this branch of the law, and, what would seem even more important, the difference between the maritime and the Common Law of England. It is this feature which makes the book one of interest not only to the Admiralty practitioner, but to the student of jurisprudence and comparative lawyer. Maritime law is in some respects more advanced than the Common Law. This casts no reflexion on the latter's qualities; for, as opposed to the Common Law, maritime law is of necessity international. It gleans from all legal systems what is useful, thus representing, as it were, a vast reservoir of international legal experience.

To give only a few examples, whereas English Common Law only a little while ago has recognised at least a limited right of a rescuer to compensation (*Haynes* v. *Harwood* (1934), 50 T.L.R. 371) maritime law has for hundreds of years not only compensated, but even granted rewards to such persons. The reason of this attitude may perhaps be found in the fact that maritime commerce cannot fall back to the same extent as is the case on land on police, fire brigades and other public institutions, but depends almost entirely on voluntary help which can only be relied on regularly if properly remunerated. Other examples are the recognition of what the Romans called *negotiorum gestio*, and to a certain extent a wider scope for the repayment of unjustified enrichments.

The new edition especially notices the numerous cases arising during the Great War. It is considerably enlarged, and substantial additions have been made particularly to the chapters on salvors and on the reward. Since the new edition was published two important decisions have been reported. In *The Kafiristan*[1] the House of Lords decided that where the wrongdoing vessel and the vessel performing salvage services belong to the same owner this will be no bar to a salvage reward becoming due to the salving vessel. In maritime law the maxim that no one should benefit by his own wrongful act may not be applied so as to produce inequitable results. The second important case is that of *Admiralty Commissioners* v. *M. V. Valverda*[2]

[1] (1937) 58 Ll. L. Rep. 317.
[2] (1937) 1 K.B. 745.

where the Court of Appeal held that s. 557, of the Merchant Shipping Act, 1894, prohibiting salvage to be earned by His Majesty's ships, could not be contracted out by a salvage agreement.

The book is written in a pleasant style and the matter is arranged by laying emphasis rather on principle than on too much detail. In this and other respects it compares favourably with other practitioners' books.

O. PRAUSNITZ.

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW. 1937. Humphrey Milford. Oxford University Press. **16s. net.**

The eighteenth issue maintains the high standard of its predecessors. It is again evenly balanced between public and private international law, two branches of the law which, in juristic method and objects, have little in common. The latter, apart from not being "international," breathes an atmosphere of refined and highly analytical legal thought, the other is closely bound up with the changing political structure of international society. The articles by Professor Smith on some legal problems of the Spanish Civil War and by Mr. Morrow on the status of the Free City of Danzig both deal with danger zones in the fabric of international law. Professor Smith discusses the question of recognition of belligerency and deals with the anomalies of the present situation. His argument in favour of recognition of belligerency does not, however, appear to take into account the unofficial intervention of foreign states which destroys the basis on which the customary rules can work. Mr. Morrow's article is now mainly of historical interest, not because the League of Nations has formally ceased to exercise its supervising function, but because it is quietly fading out, by sheer passivity, which, as regards respect for law, is probably worse. It may be suggested that the essential task for international lawyers is now to investigate why so many traditional rules of international law no longer work, as in the Spanish war, or why another attempt at piecemeal and half-hearted international government by the League has failed. Professor Smith sounds a warning note when he says that the rules of international law can only work between states which agree about certain common values. Other articles deal with the Supreme Court of the United States as an expositor of international law (Hyde) and with Custom as a means of developing international law (Kopelmanas) and with the history of relations between Britain and Egypt, culminating in the present Treaty of Alliance.

On the side of private international law, there is an historical article by Mr. Llewelyn Davies on the influence of the Dutch jurist, Huber, on the development of Conflict of Laws, and two articles on current problems of private international law. Mr. Morris criticises the attitude taken by English courts in the question of renvoi—a problem that has recently leapt into prominence in English legal literature—and Dr. Mann discusses the question of the proper law in cases of illegality, in an article which is prefaced by some very illuminating remarks on the general aspect of the question of "proper law."

Numerous notes, reports, and reviews inform as usual on principal cases and other developments in the current year.

W. FRIEDMANN.